

THE REAL STORY BEHIND THE JUSTICE DEPARTMENT'S IMPLEMENTATION OF SECTION 5 OF THE VRA: VIGOROUS ENFORCEMENT, AS INTENDED BY CONGRESS

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I

INTRODUCTION

This year, Congress is expected to reauthorize one of our Nation's most prominent and effective civil rights statutes, Section 5 of the Voting Rights Act,¹ and the President is expected to sign the renewal legislation. Section 5 requires a subset of states and local jurisdictions to obtain federal approval ("preclearance") from the Department of Justice or the District Court for the District of Columbia before implementing any change in their voting practices and procedures. This requirement is aimed at ensuring that covered jurisdictions do not implement any voting changes that are discriminatory in either purpose or effect. Section 5 is currently set to expire on August 6, 2007.²

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1. 42 U.S.C. § 1973c (2000).

2. 42 U.S.C. § 1973b(a)(8) (2000).

The reauthorization of Section 5 is expected, in turn, to set the stage for an historic decision by the Supreme Court as to whether Section 5 continues to represent a constitutional exercise of Congress' Fourteenth and Fifteenth Amendment authority to remedy discrimination in voting. The continued constitutionality of Section 5 is in doubt for several reasons. First, the statute exacts a substantial federalism cost due to the fact that, unlike any other federal statute, it requires covered states and localities to obtain federal approval before they are allowed to implement certain new enactments, i.e., enactments relating to voting. Second, federalism has become a major concern of many of the Justices, with respect to Section 5 in particular and with respect to federal-state relations in general.³ Third, there is a tension between the Supreme Court's recent line of cases limiting the use of race when devising redistricting plans⁴ and the race-conscious analyses required by Section 5. Fourth, the Supreme Court recently has adopted a more stringent test for determining the constitutionality of Congress' exercise of its remedial authority under the Fourteenth Amendment.⁵ Lastly, the voting discrimination problems that led Congress to enact Section 5 in 1965, and then reauthorize the statute on three occasions thereafter, have substantially moderated, in large part because of the

3. See *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 336 (2000) (Section 5 raises "substantial" federal costs" which, if exacerbated, could perhaps raise concerns about its constitutionality); *Miller v. Johnson*, 515 U.S. 900, 926–27 (1995) (same). See also *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 360, 368 (2001) (Americans With Disabilities Act held unconstitutional insofar as it authorized money damages against states for violations of Title I of the Act); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 66 (2000) (Age Discrimination in Employment Act held unconstitutional insofar as it authorized money damages against states).

The Supreme Court has twice rejected the claim that Section 5 unconstitutionally impinges on our federal system of government, although neither of these decisions is of recent vintage. *City of Rome v. United States*, 446 U.S. 156, 193 (1980); *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

4. E.g., *Miller*, 515 U.S. at 927–28; *Shaw v. Reno*, 509 U.S. 630, 657–58 (1993).

5. See generally *City of Boerne v. Flores*, 521 U.S. 507 (1997).

efforts of the Justice Department and private parties to enforce Section 5 and the other provisions of the Voting Rights Act.⁶

Lurking behind these issues, however, is another important question that has the potential for significantly influencing the Supreme Court's assessment of the constitutionality of Section 5. That question, which is the subject of this Article, is whether the Justice Department can be trusted to carry out its preeminent role in enforcing Section 5 in a manner that is consistent with congressional intent.⁷

In the past eleven years, the Supreme Court (or, more accurately, five of the nine Justices) has expressed deep dissatisfaction with the manner in which the Justice Department has exercised its enforcement discretion. In 1995, the Court accused the Department of applying the Section 5 purpose standard in a near unconstitutional manner, by allegedly converting it into a requirement that covered jurisdictions draw the maximum possible number of majority-minority election districts possible when enacting redistricting plans.⁸ That case did not directly concern the scope of the Section 5

6. The question of the constitutionality of a reauthorized Section 5 has received extensive attention in scholarly articles written in the past few years. See generally Richard L. Hasen, *Congressional Power to Renew Section 5 of the Voting Rights Act After Tennessee v. Lane*, 66 OHIO ST. L. J. 177 (2005); Michael J. Pitts, *Section 5 of the Voting Rights Act: A Once and Future Remedy?*, 81 DENV. U. L. REV. 225 (2003); Paul Winke, *Why the Preclearance and Bailout Provisions of the Voting Rights Act Are Still a Constitutionally Proportionate Remedy*, 28 N.Y.U. REV. L. & SOC. CHANGE 69 (2003); Victor Andres Rodriguez, *Section 5 of the Voting Rights Act of 1965 After Boerne: The Beginning of the End of Preclearance?*, 91 CAL. L. REV. 776 (2003); Pamela Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 WM. & MARY L. REV. 725 (1998). With regard to the impact of the Voting Rights Act on minority electoral opportunity, see, e.g., QUIET REVOLUTION IN THE SOUTH (Chandler Davidson & Bernard Grofman eds., 1994).

7. As shown by the statistics cited *infra*, almost all preclearance requests are directed to the Justice Department, although Section 5 gives covered jurisdictions the option of seeking preclearance from either the Justice Department or the District Court for the District of Columbia.

8. *Miller*, 515 U.S. at 927.

purpose standard, and so the Court did not alter the standard itself at that time. However, in a decision issued five years later,⁹ the Court did act to sharply restrict the purpose standard, apparently in part because of the Court's distrust of the Justice Department's willingness to fairly apply a broader standard. The Court held that discriminatory purpose under Section 5 is not the same as discriminatory purpose under the Fourteenth and Fifteenth Amendments—i.e., a purpose to minimize or restrict minority electoral opportunity—but, instead, has a highly specialized, esoteric and limited meaning—the intent to cause a retrogression in minority electoral opportunity.¹⁰ In so holding, the Court did not say that it was basing its ruling on its concern about the Justice Department's enforcement practices. But this concern appears to be the only explanation for the Court's otherwise odd and perplexing comment that a Section 5 purpose standard co-extensive with the Constitution possibly would raise “concerns about § 5's constitutionality”¹¹ (assertedly because this somehow would exacerbate Section 5's federalism costs). This statement only makes sense if the Court was saying that the use of the constitutional purpose standard in Section 5 is problematic because, in the view of the Court majority, it is a potentially dangerous, extra-constitutional weapon when placed in the hands of the Justice Department.

Accordingly, if and when a challenge to the constitutionality of a reauthorized Section 5 reaches the Supreme Court, at least several of the Justices are likely to enter into their analysis of the constitutional issues with a distinctly negative view as to the manner in which the Section 5 preclearance mechanism operates. Moreover, the Court

9. *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000).

10. *Id.* at 321.

11. *Id.* at 322.

may be faced with a renewed Section 5 requirement that includes the broader purpose standard that the Court rejected in 2000, since civil rights groups have made it a priority to legislatively reverse that decision.¹² If Congress adopts this amendment, the Court then will be squarely faced with the question whether granting the Justice Department its previous broad authority undermines the constitutionality of the reauthorization.

Previous scholarly efforts to assess the Justice Department's enforcement approach have foundered in large part because of the difficulty that exists in obtaining information about the preclearance analyses utilized by the Department.¹³ Although the Justice Department sets forth the reasons underlying each preclearance denial ("objection") in a public letter written to the submitting jurisdiction, these letters provide only limited information about the Justice Department's analytic approaches because they are summary in nature and because each letter only addresses the particular changes that are under review. Furthermore, the Department does not provide any explanation when it decides to preclear submitted voting changes (these decisions are announced in form letters that simply identify the submitted changes and state that an objection is not being interposed).¹⁴ As a result, relatively few evaluations have

12. American Civil Liberties Union, *Promises to Keep: The Impact of the Voting Rights Act in 2006*, at 31–32, March 2006, available at http://www.aclu.org/images/asset_upload_file516_24396.pdf.

13. As a member of the Voting Section of the Justice Department's Civil Rights Division for fifteen years and a Section 5 supervisor for approximately ten years, this author is well versed in the analyses used by the Department and understands the difficulties persons outside the Department face in obtaining information about these analyses.

14. The limited scope of the information provided by the Department's objection letters also has been noted by other commentators. Peyton McCrary, Christopher Seaman, & Richard Valelly, *The End of Preclearance as We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act*, MICH. J. RACE & L. (forthcoming May 2006) (manuscript at 5–6); Hiroshi Motomura, *Preclearance Under Section 5 of the Voting Rights Act*, 61 N.C. L. REV. 189, 192 (1983).

been undertaken of the Justice Department's Section 5 decisionmaking, and (as is discussed *infra*) many of the evaluations that have been undertaken have rendered flawed judgments based on fragmentary information.

This Article seeks to gain a deeper understanding of the Justice Department's approach to enforcing Section 5, and to assess that approach accurately, by studying the patterns evidenced in the Department's objection letters as a whole and linking these patterns to an analysis of the structure and content of the preclearance remedy designed by Congress.¹⁵ The Article concludes first that the Justice Department, historically, has vigorously carried out its Section 5 decisionmaking authority, by broadly interpreting the scope of the Section 5 nondiscrimination standards (within the bounds of relevant court decisions) and conducting stringent reviews of the evidence offered by covered jurisdictions in support of their submitted voting changes. Second, the Article concludes that the structure and scope of the Section 5 remedy are, to a large extent, responsible for the federal government's vigorous administrative enforcement, and thus the Justice Department's approach to enforcing Section 5 is precisely what Congress intended. In sum, the Justice Department's enforcement of Section 5 fully supports a ruling

15. This author, as well as a few other commentators, previously have used Justice Department objection letters as a group to analyze Department decisional patterns. Mark A. Posner, *Post-1990 Redistrictings and the Preclearance Requirement of Section 5 of the Voting Rights Act*, in RACE AND REDISTRICTING IN THE 1990S 80 (Bernard Grofman ed., 1998); McCrary, Seaman, & Valelly, *supra* note 14, at 7; Motomura, *supra* note 14, at 191-92. Since 1965, the Department has issued approximately one thousand objection letters. McCrary, Seaman, & Valelly, *supra* note 14, at 30. Copies of these letters are on file with the author. In addition to the letters, the Department maintains a list of all Section 5 objections, which this author also used in preparing this article. Complete Listing of Objections Pursuant to Section 5 of the Voting Rights Act of 1965, available at http://www.usdoj.gov/crt/voting/sec_5/obj_activ.htm [hereinafter Complete Listing of Section 5 Objections].

by the Supreme Court that a reauthorized Section 5 is constitutional.¹⁶

The Article begins, in Part I, by describing the special and often unique features of the Section 5 preclearance remedy. This is followed, in Part II, by an overview of the Justice Department's Section 5 decisions. Part III considers the various assessments that previously have been offered regarding the Justice Department's preclearance modus operandi—the Justice Department as the illegitimate advocate for minority voters; the Justice Department as the endorser of discriminatory changes; and the Justice Department as an above-the-fray, case-by-case problem-solver—and identifies important flaws in these assessments. Finally, in Part IV, the Article sets forth the author's view of the real story behind the Department's preclearance decisionmaking. The Article identifies the various ways in which the Department has evidenced a vigorous and forceful approach to enforcing Section 5, and links this evaluation with the discussion from Part I to explain why the Department's enforcement approach is the product of, and fully in accord with, Congress' design of the Section 5 remedy.

II

THE ELEMENTS OF THE SECTION 5 REMEDY AND ITS ENFORCEMENT SCHEME

The framework which defines the nature and scope of the Section 5 remedy, and which channels its enforcement, has two important

16. A separate question regarding the Justice Department's approach in enforcing Section 5 is whether the Department's decisionmaking has been affected by partisan political interests. That question is addressed in a recent essay published by this author and is not addressed here. Mark A. Posner, *The Politicization of Justice Department Decisionmaking Under Section 5 of the Voting Rights Act: Is it a Problem and What Should Congress Do?*, <http://www.acslaw.org/files/Section%205%20decisionmaking%201-30-06.pdf>.

parts: the statutory provisions enacted by Congress, as construed by the courts; and the administrative provisions adopted by the agency designated by Congress to enforce the remedy, the United States Department of Justice.

A. The Section 5 Statutory Framework

The basic requirements of Section 5, as enacted by Congress, may be stated simply and succinctly. The law requires that certain designated states and localities—located principally, but not entirely, in the South—obtain federal preclearance whenever they “enact or seek to administer”¹⁷ a change in any voting practice or procedure. Preclearance may be obtained from either the United States District Court for the District of Columbia or the Attorney General. To obtain preclearance, jurisdictions must demonstrate that the change does not have the purpose and will not have the effect of discriminating on the basis of race or color; a subset of the covered jurisdictions also must also demonstrate that the change does not have a discriminatory purpose or effect with respect to persons who are members of a “language minority group”¹⁸ (“persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage”).¹⁹ Unless and until preclearance is obtained, the change is unlawful and cannot be implemented.²⁰ Section 5 initially was enacted for a term of five years, and has been amended and extended

17. Voting Rights Act, 42 U.S.C. § 1973c (2000).

18. *Id.* § 1973b(f)(2).

19. *Id.* § 1973l(c)(3).

20. *Lopez v. Monterey County*, 519 U.S. 9, 20–22 (1996); *Clark v. Roemer*, 500 U.S. 646, 652–53 (1991).

by Congress on three occasions since 1965, in 1970, 1975, and 1982.²¹ As previously noted, it is currently due to expire in August 2007.

Examined more closely, Section 5 is composed of a total of eight distinct requirements and provisions, many of which are unique or uncommon in American jurisprudence, and others which were written to provide broad and all-encompassing protection to minority citizens as they seek to participate on an equal basis in our Nation's political processes. Together, they give Section 5 its remarkable remedial power. These include five structural innovations regarding the allocation of government authority and the application of Anglo-American jurisprudential principles; coverage provisions that define in a novel manner the jurisdictions subject to the preclearance requirement and sweep broadly to identify the voting practices that are covered; and nondiscrimination standards that, on their face, are broad and stringent in their requirements.

Structural innovations:

*Most dramatically, Section 5 reverses one of the fundamental organizing principles of our federal model of government, that state and local enactments are presumed legal and enforceable under the Constitution and federal law unless and until a court (or other legal body) determines that an enactment violates a standard or rule enacted by the national government, and prohibits its implementation.*²²

21. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, §§ 2, 5, 84 Stat. 314, 314-15 (1970); Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, §§ 204, 206, 405, 89 Stat. 402, 402-05 (1975); Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(b)(8), 96 Stat. 131, 133 (1982).

22. In 1966, the Supreme Court upheld the constitutionality of this exception to the federal model, but recognized that it represents "an uncommon exercise of congressional power." *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966). Justice Black, the lone dissenter, attacked Section 5 as constituting a "radical degradation of state power." *Id.* at 360 (Black, J., concurring in part and dissenting in part).

This reversal of the ordinary legal presumption is at the heart of the Section 5 remedy. As explained by the Supreme Court, Congress determined that after “nearly a century of systematic resistance to the Fifteenth Amendment,” it was necessary to “shift the advantage of time and inertia” from those seeking to engage in discrimination to its victims.²³ Thus, under the Section 5 regime, discriminators no longer can simply design and implement new methods of discrimination to stay a step ahead of legal or political challenges to an existing discriminatory practice. They must pass each new provision through the federal preclearance screen.

*Section 5 also reverses one of the fundamental organizing principles of American jurisprudence, that a party challenging an action taken by another bears the burden of proof (risk of nonpersuasion) in demonstrating that the action is unlawful. Instead, Section 5 places the burden of proof on covered jurisdictions to demonstrate that their voting changes are nondiscriminatory.*²⁴

This provision is closely related to the presumption of unlawfulness that the statute attaches to voting changes that covered jurisdictions enact or seek to administer. In essence, Section 5 defines the status quo as being the absence of any change and then, consistent with the usual system of American jurisprudence, requires the party seeking to alter the status quo, namely the covered jurisdictions, to bear the burden of proof.

23. *Id.* at 328.

24. Section 5 does not explicitly state that covered jurisdictions have the burden of proof in Section 5 preclearance lawsuits, but this clearly was understood to be the intent of the statute. *Id.* at 328, 335. The Attorney General’s regulations governing Section 5 administrative reviews likewise specify that jurisdictions that seek preclearance from the Justice Department bear the burden of proving that their voting changes are nondiscriminatory. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. § 51.52(a) (2005). The Attorney General’s determination in this regard was upheld by the Supreme Court. *Georgia v. United States*, 411 U.S. 526, 541 (1973).

Section 5 alters the typical allocation of authority among federal district courts by transferring the authority for deciding whether voting changes are discriminatory from district courts located in the covered jurisdictions (the courts that typically decide federal law challenges to the actions of state and local governments) to federal officials in our nation's capital, Washington, D.C.

Congress recognized that local federal judges often have close ties to the political establishment in the jurisdictions where they sit and that decisions made pursuant to Section 5 could affect the ability of incumbent officials to retain power as against persons who historically had been excluded from the political process. Congress determined that these circumstances involved an unacceptable risk of biased decisionmaking by local judges.²⁵

Section 5 creates a novel power-sharing arrangement between the District Court for the District of Columbia and the Attorney General, whereby both are empowered to grant or deny preclearance to the voting changes that covered jurisdictions enact or seek to administer.

The statute allows jurisdictions to obtain judgments about the lawfulness of their actions through the usual method of judicial review, by filing a declaratory judgment action in the District of Columbia Court naming the Attorney General (or the United States) as defendant. In addition, however, Section 5 gives jurisdictions the ability to bypass the judicial process and go straight to the statutory defendant, the Attorney General, to obtain a legally binding

25. Congress had had specific experience in that regard. In the years immediately preceding the enactment of the Voting Rights Act, it had sought to address voting discrimination in the South by enacting legislation that authorized the Justice Department to file suit in local district courts challenging discriminatory provisions. *Katzenbach*, 383 U.S. at 313–16. The Justice Department's efforts were frustrated in part by the ingenuity of the defendant jurisdictions and the proof problems posed by the lawsuits. *Id.* at 314. However, the Department also found it difficult to prevail because of the hostility of certain local district judges to the enfranchisement of black citizens. DAVID GARROW, PROTEST AT SELMA: MARTIN LUTHER KING JR., AND THE VOTING RIGHTS ACT OF 1965 22–23 (1978); Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523, 548 (1973).

determination as to whether the voting change is lawful. If the Attorney General grants preclearance, the Section 5 process is over and the change may be implemented; if the Attorney General interposes an objection, the change remains unenforceable but jurisdictions still, if they wish, may proceed with a preclearance lawsuit in the district court with no negative consequence in the litigation from the fact that the Attorney General objected.²⁶

As initially drafted, Section 5 only included the judicial preclearance mechanism, but Congress realized that an alternative, non-judicial mechanism was also needed because of the financial burdens associated with litigation.²⁷ The obvious way to create a preclearance short-cut was to allow jurisdictions to go straight to the statutory defendant, the Attorney General, to request essentially a consent judgment that particular voting changes are not discriminatory.

The Attorney General's role also is special because of the fact that Congress did not grant minority voters any statutory role in the process. The Attorney General is the sole statutory defendant in Section 5 declaratory judgment lawsuits (although minority voters may be allowed to intervene),²⁸ and minority voters do not have a statutory role in the Attorney General's administrative preclearance process (although the Attorney General encourages minority voters to comment about submitted changes).²⁹ Furthermore, the Supreme

26. Preclearance lawsuits filed after a Justice Department objection are not litigated as reviews of the Department's administrative action, and therefore are considered *de novo*. *Morris v. Gressette*, 432 U.S. 491, 505 n.21 (1977). Thus, there is no presumption in post-objection preclearance suits that the Department's determination was correct.

27. *Id.* at 503.

28. *Georgia v. Ashcroft*, 539 U.S. 461, 476–77 (2003).

29. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. § 51.20 (2005).

Court has held that the Attorney General's decisions to preclear voting changes may not be challenged in court by dissatisfied minority voters.³⁰

It should be noted that while Section 5's power-sharing arrangement is unique, there is nothing remarkable about Congress' choice of the Attorney General as the executive partner in this arrangement. The Attorney General is the executive official that Congress designated to enforce previous federal provisions regarding the voting rights of minority citizens,³¹ who is the official responsible for enforcing other provisions of the Voting Rights Act of 1965,³² and many other federal civil rights statutes.³³

*Section 5 requires the Attorney General to make administrative preclearance decisions within a very short period of time – sixty days after a preclearance request is filed with the Attorney General by a covered jurisdiction—and if the Attorney General does not interpose an objection within the required time period, the change is precleared automatically.*³⁴

The Attorney General was given this brief window of time to conduct Section 5 reviews because covered jurisdictions have a strong interest in promptly implementing their new voting provisions, and thus have a strong interest in obtaining expeditious reviews of their voting changes.³⁵ The Attorney General has a limited ability to expand the review period by restarting the sixty-day

30. *Morris*, 432 U.S. at 507.

31. 42 U.S.C. § 1971 (2000).

32. *Id.* §§ 1973b, 1973d, 1973f, 1973g(c), 1973j(d), 1973aa-2.

33. *Id.* §§ 2000a-3 (discrimination in public accommodations), 2000b (discrimination in certain publicly owned facilities), 2000c-6 (discrimination in public education), 2000e-6 (discrimination in public employment), 3610 (housing discrimination), 3612 (same), 3614 (same), 12117 (discrimination on the basis of disability), 12134 (same), 12188 (same), 14141 (police misconduct), 3789d (discrimination in programs receiving federal crime control funds).

34. *Morris*, 432 U.S. at 502.

35. *Id.* at 504.

statutory period when, in certain circumstances, a submitting jurisdiction provides additional information to the Attorney General after the initial submission is made.³⁶ However, the Attorney General is not allowed to expand the review period to pursue any elaborate discovery, conduct a hearing, or simply to have additional time in which to decide close cases.³⁷

Coverage provisions:

*By its terms, Section 5 applies to a limited subset of states and local jurisdictions, unlike other anti-discrimination statutes, which have nationwide application.*³⁸

Coverage is determined pursuant to a nondiscretionary formula, contained in Section 4 of the Act, which selects those states, as well as those local jurisdictions (typically, counties), that utilized discriminatory voting tests or devices at the time of the 1964, 1968, or 1972 elections and, consequently, had a comparatively low voter registration or turnout rate at that election.³⁹ Section 4 also provides that jurisdictions covered by the formula may “bail out” of coverage by demonstrating (in a lawsuit filed in the District of Columbia

36. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. § 51.37 (2005) (additional information provided at the request of the Attorney General), *id.* § 51.39 (supplemental information provided by the submitting jurisdiction or a related submission made by that jurisdiction). The Attorney General’s authority to issue the first regulation was challenged and was upheld by the Supreme Court. *Georgia v. United States*, 411 U.S. 526, 541 (1973).

37. *See generally* Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. pt. 51, subpt. E (2005).

38. 20 U.S.C. § 1681 (2000) (discrimination on the basis of sex in federally assisted programs or activities); 29 U.S.C. § 794 (2000) (discrimination on the basis of disability in federally assisted programs or activities); 42 U.S.C. §§ 1971 (2000) (discrimination in voting), 1973 (same), 2000a (discrimination in public accommodations), 2000a-1 (discrimination required by state law), 2000d (discrimination in federally assisted programs or activities), 2000e-2 (discrimination in public employment), 2000e-3 (same), 3604-06 (housing discrimination), 12112 (discrimination on the basis of disability), 12132 (same), 12182 (same), 3789d(c) (discrimination in programs receiving federal crime control funds).

39. 42 U.S.C. § 1973b (2000).

District Court) that the specific electoral circumstances in the jurisdiction are such that coverage is not justified.⁴⁰

Today, through the application of the coverage formula and the resolution of bail-out lawsuits, Section 5 applies to eight states in their entirety: Alaska, Alabama, Arizona, Georgia, Louisiana, Mississippi, South Carolina, and Texas; and to substantial portions of three other states: New York (the Bronx, Brooklyn, and Manhattan), North Carolina (forty of the State's one hundred counties), and Virginia (the entire State except eleven counties and independent cities). It also applies to relatively small portions of California, Florida, Michigan, New Hampshire, and South Dakota.⁴¹

*Section 5 broadly applies to "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" if and when the voting provision is changed.*⁴²

The types of voting provisions covered by Section 5 include: redistrictings; election method changes (such as changes to at-large or district voting, the use of a majority-vote or plurality-vote requirement, and numbered posts or residency districts for at-large voting); changes in the number of elected officials; annexations and other boundary line changes that alter the voting constituency of a jurisdiction; changes in voter-registration standards and procedures; changes in polling place, early voting, and absentee voting procedures; precinct changes and polling location changes; changes of the languages in which voting materials and information are

40. See Paul F. Hancock and Lora L. Tredway, *The Bailout Standard of the Voting Rights Act: An Incentive to End Discrimination*, 17 URB. LAW. 379, 381–82 (1985) (providing a detailed explanation of the bail-out procedure).

41. The current list of jurisdictions covered by Section 5 is available at U.S. Department of Justice Civil Rights Division, Section 5 Covered Jurisdictions, http://www.usdoj.gov/crt/voting/sec_5/covered.htm (last visited March 14, 2006).

42. 42 U.S.C. § 1973c (2000).

provided to the public; election date changes and the holding of special elections; and changes in candidate qualification standards and procedures.⁴³

Nondiscrimination Standards

*Section 5 prohibits both the implementation of voting changes that have a discriminatory purpose and changes that have a discriminatory effect. On its face, this standard is all-encompassing, stringent, and uncompromising, which reflects Congress' determination to respond to "exceptional [historical] conditions" by utilizing an "uncommon exercise of congressional power" to fashion a "decisive" remedy.*⁴⁴

Over time, however, the Supreme Court has substantially diminished the stringency of the nondiscrimination test. Early on, in its 1976 decision in *Beer v. United States*, the Court held that the Section 5 effect standard means "retrogression."⁴⁵ Under this approach, the effect analysis is conducted by comparing minority voters' electoral opportunity under the new and old provisions; only if the change worsens that opportunity will the change be deemed to have a prohibited effect.⁴⁶ The Court rejected a broader test under which the effect standard would have been co-extensive with the constitutional test of minority vote dilution.⁴⁷ Up until recently, the retrogression analysis has focused on the opportunity of minority

43. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. § 51.13–.18 (2005).

44. *South Carolina v. Katzenbach*, 383 U.S. 301, 334–35 (1966). See also *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 363 (2000) (Souter, J., concurring in part and dissenting in part) (describing the Section 5 test, as articulated in the statute, as "unconditional" and "uncompromising").

45. 425 U.S. 130, 141 (1976).

46. See also *City of Lockhart v. United States*, 460 U.S. 125, 134 n.10 (1983) (interpreting the *Beer* Court's holding).

47. That test had been set forth by the Court in the case of *White v. Regester*, 412 U.S. 755, 766 (1973).

voters to elect candidates of their choice.⁴⁸ In 2003, however, in *Georgia v. Ashcroft*, the Court held that the retrogression analysis also must consider the impact of the change on the opportunity of minority voters to influence (but not decide) elections, and the impact on minority voters' elected representatives' ability to exert legislative leadership, influence, and power.⁴⁹

Pursuant to a 1975 Supreme Court decision, *City of Richmond v. United States*, a special effect test is used for reviewing annexations.⁵⁰ Under that test, an annexation that meaningfully reduces a city's minority population percentage in the context of racially polarized voting may be precleared only if the city's election system "fairly reflects" minority voting strength in the enlarged city.⁵¹

Notwithstanding the Court's decision in *Beer*, and during almost the entire history of Section 5, the statute's purpose standard broadly prohibited the implementation of changes that had any discriminatory intent, regardless of whether the intended harm was retrogression or vote dilution. As noted, in 2000 the Court severely restricted the scope of the purpose standard in its decision in *Reno v. Bossier Parish School Board* ("*Bossier Parish II*"), holding that discriminatory purpose under Section 5 means only the intent to cause retrogression.⁵² This effectively read the purpose standard out of the statute since the standard now adds little or nothing to the

48. *Bush v. Vera*, 517 U.S. 952, 983 (1996); *Georgia v. Ashcroft*, 195 F. Supp. 2d 25, 29–31 (D.D.C. 2002), *vacated and remanded*, 539 U.S. 461, 491 (2003); Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c (2000), 66 Fed. Reg. 5412, 5413 (Jan. 18, 2001).

49. 539 U.S. at 483–85.

50. 422 U.S. 358 (1975).

51. *Id.* at 371.

52. 528 U.S. 320, 329–32 (2000).

prohibition on the adoption of retrogressive voting changes contained in the Section 5 effect standard.⁵³

Beginning in the 1980s, the Justice Department also interposed objections where a change violated the requirements of another provision of the Voting Rights Act. This included “clear” violations of the “results” test of Section 2 of the Act;⁵⁴ violations of Sections 4(f)(4)⁵⁵ and 203,⁵⁶ which require certain jurisdictions to provide

53. After *Bossier Parish II*, the purpose test is meaningful in Section 5 reviews only if and when a voting change is adopted by an incompetent retrogressor, i.e., a jurisdiction that intends to engage in retrogression but adopts a change that is not retrogressive in fact. This circumstance is highly unlikely to occur and, indeed, the Justice Department has yet to find an incompetent retrogressor in the over six years since *Bossier Parish II* was decided.

Bossier Parish II clarified two prior decisions of the Supreme Court holding that discriminatory purpose under Section 5 is co-extensive with the constitutional purpose standard. *Id.* at 331 (noting that *City of Richmond v. United States*, 422 U.S. 358 (1975), “does not stand for the proposition that the purpose and effect prongs have fundamentally different meanings—the latter requiring retrogression, and the former not”); *Id.* at 340–41 (noting that the holding in *City of Pleasant Grove v. United States*, 479 U.S. 462 (1987), “had nothing to do with the question whether, to justify the denial of preclearance on the basis of the purpose prong, the purpose must be retrogressive” but rather “whether the purpose must be to achieve retrogression at once or could include, in the case of a jurisdiction with no present minority voters, retrogression with regard to operation of the proposed plan . . . against new minority voters in the future”). Prior to *Bossier Parish II*, the Court took a first step toward ruling that non-retrogressive changes may not violate the Section 5 purpose standard in its decision in *Miller v. Johnson*, 515 U.S. 900, 923–24 (1995), suggesting that the fact that a change is ameliorative should weigh heavily in favor of the conclusion that the change lacks a discriminatory purpose.

54. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 52 Fed. Reg. 490 (Jan. 6, 1987) *codifying* 28 C.F.R. § 51.55(b) (1986), *repealed by* 63 Fed. Reg. 24,109 (May 1, 1998). The results test of Section 2 of the Act, 42 U.S.C. § 1973 (2000), renders unlawful any voting provision that denies minority voters an equal opportunity “to participate in the political process and to elect representatives of their choice.” *See generally* *Johnson v. De Grandy*, 512 U.S. 997 (1994); *Voinovich v. Quilter*, 507 U.S. 146 (1993); *Grove v. Emison*, 507 U.S. 25 (1993); *Thornburg v. Gingles*, 478 U.S. 30 (1986). A results claim does not require proof of discriminatory purpose. When the Section 2 challenge is directed at an at-large election system, a system of multi-member districts, or a redistricting plan, the key issues are whether the minority group is sufficiently large and geographically compact to constitute a majority in one or more single-member districts, whether the minority group votes in a cohesive manner, and whether white voters cast their ballots sufficiently as a bloc to enable them to usually defeat the minority’s preferred candidate. These factors are not necessarily determinative and a variety of other factors may be considered, as well as the overall impact of the challenged provision with regard to the extent to which it provides an opportunity for minority voters to achieve proportional representation. *Johnson*, 512 U.S. at 1006–08, 1011–12.

55. 42 U.S.C. § 1973b(4)(f)(4) (2000).

election materials in languages other than English; and violations of Section 208,⁵⁷ which provides that voters may obtain assistance at the polls from any person of their choice, other than their employer or union representative. However, in 1997, in its initial decision in the *Reno v. Bossier Parish School Board* litigation (“*Bossier Parish I*”), the Court held that preclearance may not be denied based on a Section 2 results violation, thereby also precluding objections based on violations of other provisions of the Act.⁵⁸

B. The Section 5 Administrative Framework

The specific features of the administrative preclearance mechanism almost entirely have been developed by the Attorney General. As described above, Congress made two critical decisions about the administrative preclearance process when it enacted Section 5—preclearance decisions are to be made by the Attorney General and preclearance decisions are to be made relatively quickly.⁵⁹ Beyond that, however, Congress has provided no further direction, either in the statute or in legislative history.⁶⁰

In the absence of congressional direction, the Attorney General has developed a comprehensive set of procedures for making Section 5 decisions. These are set forth in the Attorney General’s Procedures for the Administration of Section 5,⁶¹ which initially were

56. *Id.* § 1973aa-1a.

57. *Id.* § 1973aa-6.

58. 520 U.S. 471, 480 (1997).

59. *See supra* p. 8–9 and notes 26–37.

60. *See Morris v. Gressette*, 432 U.S. 491, 504 n.18 (1977) (pointing out the absence of legislative history regarding the adoption of the administrative preclearance option); *Georgia v. United States*, 411 U.S. 526, 536 (1973) (discussing the fact that Section 5 does not specify the preclearance procedures to be used by the Justice Department).

61. 28 C.F.R. pt. 51 (2004).

promulgated in 1971⁶² and have remained essentially the same since then.⁶³ They are also reflected in certain informal practices that have been followed, beginning at about the time that the written procedures first were put forward.⁶⁴ Several of the most important features of the written procedures, discussed below, were easily foreseen at the time Section 5 was enacted and thus, it may be argued, were fully anticipated by Congress in 1965. Moreover, following the promulgation of the Section 5 Procedures in 1971 and the adoption of the other, informal processes, Congress has twice renewed Section 5 (in 1975 and 1982) with full knowledge of the administrative structure and processes established by the Attorney General.⁶⁵ Accordingly, it may be fairly concluded that the administrative framework crafted by the Attorney General fully accords with congressional intent.⁶⁶

Perhaps the most important of the provisions included in the Section 5 procedures is the delegation of authority to make Section 5 preclearance decisions from the Attorney General to the Assistant

62. 36 Fed. Reg. 18,186 (Sept. 10, 1971).

63. Compare the initial regulations *supra* note 62, with the current regulations *supra* note 61. The principal change was the addition in 1987 of a section describing the substantive standards used by the Justice Department in making its preclearance decisions. 52 Fed. Reg. 486 (Jan. 6, 1987).

64. These informal procedures are well known to the author based on his work supervising Section 5 reviews within the Justice Department.

65. *Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 97th Cong. 1717, 1729–39 (1982) (exhibits to the testimony of Assistant Attorney General William Bradford Reynolds); *Extension of the Voting Rights Act of 1965: Hearing Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 94th Cong. 601–09 (1975) (exhibits to the testimony of Assistant Attorney General J. Stanley Pottinger).

66. See *United States v. Bd. of Comm'rs of Sheffield*, 435 U.S. 110, 132 (1978) (congressional inaction evidence of congressional intent); *Georgia v. United States*, 441 U.S. 526, 533 (1973) (same). The Supreme Court also has stated that the Justice Department's administrative interpretation of the Act typically provides persuasive evidence of congressional intent in light of the Attorney General's primary role in initially formulating the statute. *Lopez v. Monterey County*, 525 U.S. 266, 281 (1999); *Dougherty County Bd. of Educ. v. White*, 439 U.S. 32, 39 (1978); *Bd. of Comm'rs of Sheffield*, 435 U.S. at 131.

Attorney General for Civil Rights.⁶⁷ It is hardly surprising that the Attorney General did not retain this authority given the scope of the Section 5 decisional workload (initially, hundreds of preclearance decisions each year and, by the early 1970s, thousands of decisions each year).⁶⁸ It also was clearly foreseeable that the Civil Rights Division, rather than some other existing entity in the Department or some new, specially created unit, would be selected to receive the delegation of authority. The Division was the entity in the Department that had been responsible for prosecuting voting rights litigation prior to the 1965 Act,⁶⁹ and thus had the necessary knowledge, expertise, and interest to enforce the administrative preclearance requirement.

The Section 5 procedures further delegate a large portion of the decisional authority from the Assistant Attorney General to the Chief of the Division's Voting Section, a career government employee.⁷⁰ The Section Chief generally is empowered to make all Section 5 decisions except objections and decisions whether to withdraw an objection.⁷¹ The delegation of authority to the Voting Section Chief reflects the informal rule that all factual investigations of administrative preclearance requests are conducted by the Section's career lawyers and legal analysts, who then prepare the requisite factual and legal analyses. Again, given the very large number of

67. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. § 51.3 (2005).

68. See discussion *infra* Part II.

69. GARROW, *supra* note 25, at 12–18.

70. 28 C.F.R. § 51.3 (2004).

71. *Id.* Accordingly, the Section Chief typically may decide to preclear any and all the changes submitted for review, and may decide whether instead to make a written request to the submitting jurisdiction for additional information on the changes (essentially, a limited set of interrogatories that allows the sixty-day review period to begin anew when the jurisdiction fully responds to the request). *Id.* § 51.37.

administrative preclearance decisions that must be made each year, it is hardly surprising that the overwhelming majority of the decisions are made by a senior career attorney in the Division and that the Division's career staff plays a central role in shaping the Department's understanding of whether the submitted change is discriminatory or not.

The Section 5 procedures establish a highly structured but relatively informal set of procedures for conducting administrative preclearance reviews. Jurisdictions initiate a review by sending a letter to the Voting Section that identifies the voting changes at issue and provides certain background data and documentation.⁷² The Justice Department then conducts a factual investigation and either preclears, objects, or states that a substantive determination is inappropriate (e.g., because the submitted voting provision does not constitute a change from prior practice or has not been finally enacted by the jurisdiction).⁷³

The administrative review procedure is fundamentally different from the procedures that apply when preclearance is sought from the district court. Though the Justice Department uses the same legal standard and the same burden of proof as the court,⁷⁴ the administrative procedure includes no hearing where witnesses may be examined and cross-examined, no depositions, no authority to subpoena documents, and no formal rules of evidence regarding the information that may be considered by the Department.⁷⁵ These differences are the direct and inevitable result of the extreme time pressure created by the statutory sixty-day review requirement and

72. *Id.* §§ 51.27–.28.

73. *Id.* §§ 51.35, 51.41, 51.44, 51.52.

74. *Id.* § 51.52(a).

75. *Id.* 28 C.F.R. pt. 51, subpt. E.

the tremendous number of submissions that must be resolved on a daily basis by the Department.

This time pressure also is probably largely responsible for the summary nature of the Justice Department's objection letters. There simply is no time for the preparation of detailed justification statements.⁷⁶ Likewise, there is no time to explain the reasons for Department decisions to preclear submitted changes.⁷⁷

III

OVERVIEW OF THE JUSTICE DEPARTMENT'S PRECLEARANCE DECISIONS

The first step in assessing the appropriateness of the Justice Department's preclearance decisionmaking is to obtain an overall picture of the Department's preclearance decisions. Relevant questions include: How often has the Attorney General denied preclearance? How does the number of objections compare to the total number of submitted changes? What types of changes most frequently have been found to be discriminatory? To what extent have the objections been based on retrogression, non-retrogressive discriminatory purpose, or violations of other provisions of the Voting Rights Act? Have there been any changes in the patterns of Section 5 activity over time? And, lastly, how many preclearance decisions have been made by the District of Columbia Court as

76. In addition, the time pressure and the limited tools available to the Justice Department to obtain information necessarily render the Department's analyses and conclusions somewhat provisional in nature, which in turn could make the Department reluctant to set forth detailed findings in the objection letters.

77. *See id.* § 51.42 (suggesting that preclearance determinations need not be accompanied by any explanation since it specifies that the Department may preclear changes simply by not responding within the sixty-day review period).

compared with the Attorney General, and to what extent has the district court denied preclearance?⁷⁸

A. Summary of Section 5 Actions Since 1965

Since the enactment of Section 5 in 1965, the Justice Department has interposed objections to approximately 3,126 individual voting changes contained in approximately 1,102 submissions. The great

78. The statistics cited in this article are current through 2005. Except as otherwise noted, all statistics were obtained from the computer database maintained by the Department of Justice. All Justice Department data reports relied upon are on file with the author. These include: "Number of Objections by Type of Change"; "Number of Submissions to Which Objections Have Been Interposed"; "Number of Changes by Type of Change"; and "Number of Submissions by State." A version of the "Number of Changes by Type of Change" report is located on the Justice Department's website (http://www.usdoj.gov/crt/voting/sec_5/changes.htm); the Department has not placed the other three types of reports on its website, but they are available by request from the Department. The author has had extensive experience in utilizing the Justice Department's preclearance statistics and also was responsible for designing and supervising the implementation of the Department's current data system.

The Justice Department counts its Section 5 actions in two ways, by voting changes and by submissions. Voting changes are the discrete, individual modifications in voting practices and procedures that covered jurisdictions enact or seek to administer, and are the legal units of activity subject to Section 5 review. (For example, each discrete polling place that is moved constitutes a voting change as does each modification in state election law, and each redistricting plan is a single change.) When covered jurisdictions submit a preclearance request to the Justice Department, they frequently include several related voting changes in one request (e.g., several polling place changes, several municipal annexations, or a redistricting and a realignment of voting precincts), and the Department counts each set of changes submitted on the same date by a particular jurisdiction as a single "submission."

The Justice Department's statistics are reasonably accurate, and provide a reliable portrait of the levels and trends of administrative preclearance activity. For a variety of reasons, the statistics are not absolutely precise, but the statistical problems are relatively slight. The data for preclearance activity beginning in 1990 (when the Department began use of a modern relational database) are the most accurate, and include additional levels of detail that provide a greater opportunity to drill down into the data for analysis purposes.

The preclearance statistics cited in this Article as representing the Section 5 data set also include the very small number of voting changes submitted for preclearance pursuant to a different provision of the Voting Rights Act, Section 3(c). 42 U.S.C. § 1973a(c) (2000). Section 3(c) grants district courts the authority to require a jurisdiction not covered by Section 5 to obtain preclearance of its voting changes, for a specified period of time, as part of the relief granted to plaintiffs in a voting discrimination lawsuit. Based on this author's review of Justice Department preclearance statistics, it appears that Section 3(c) changes make up less than one percent of the total number of changes submitted pursuant to both requirements, and only one objection has been interposed to a Section 3(c) submission.

majority of the objections (81 percent) deal with changes to the constituencies used to elect public officials and the rules for determining election outcomes, i.e., annexations (1,261 or 40 percent), method of election changes (771 or 25 percent), and redistrictings (509 or 16 percent). In other words, the great majority of the objections deal with the issue of minority vote dilution.⁷⁹

These objections have had an enormous impact on the electoral practices of the covered jurisdictions and, in turn, on the electoral opportunity of minority citizens. The objections have directly altered the election practices of numerous jurisdictions.⁸⁰ In addition, the deterrence that has flowed from the objections has exerted a substantial influence on covered jurisdictions, prompting them to both refrain from adopting voting changes harmful to minority voters and to adopt beneficial changes.⁸¹

B. Patterns of Section 5 Activity by Time Period

As set forth in Tables 1 and 2 below, there have been significant changes over time with regard to the number of submissions received by the Department of Justice, the number of objections interposed by the Department, and the legal bases relied upon by the Department in interposing objections.

79. The Justice Department objection statistics include a small percentage of objections that were interposed and then later withdrawn by the Department. Complete Listing of Section 5 Objections, *supra* note 15. The Department's withdrawal letters reflect that objections may be withdrawn either because the jurisdiction has acted to remedy the discriminatory features of the change or because the Department concludes that it erred in its initial determination. The small number involved in the latter group does not meaningfully skew the objection numbers reported in this Article.

80. *Id.*

81. Bernard Grofman, *Would Vince Lombardi Have Been Right If He Had Said: "When It Comes to Redistricting, Race Isn't Everything, It's the Only Thing"?*, 14 CARDOZO L. REV. 1237, 1263–65 (1993); Posner, *supra* note 15, at 94–96.

Table 1 summarizes the number of submissions and objections by summing them generally into five-year time periods:⁸²

Table 1: Submissions and Objections by Time Period

Subject	1965 –70	1971 –75	1976– 80	1981– 85	1986– 90	1991– 95	1996– 00	2001– 05	Total
Submitted									
Submissions	—	—	—	—	—	22, 980	21, 447	24, 894	—
Changes (all)	578	5,976	28, 244	64, 742	86,575	92, 243	79, 472	81, 422	439, 252
Annex's	11	1,585	5,653	10, 016	19,356	14, 157	17, 900	20, 253	88, 931
Redist'ings	43	612	600	1,734	1,180	2,940	402	2,888	10, 240
MOE ⁸³	—	—	—	1,756	3,597	4,829	2,513	2,604	15, 495 ⁸⁴
Objections									
Submissions	22	185	197	186	138	302	32	40	1,102
Changes (all)	25	386	400	496	1, 137 ⁸⁵	579	55	48	3,126

82. The Justice Department did not begin to track the number of new Section 5 submissions until 1990. Accordingly, the chart includes submission numbers only beginning with the 1991–1995 half-decade period (the Department does report submission data for 1980 through 1989, but these data were constructed after-the-fact and are only very roughly accurate). The Department did not begin to track the number of submitted election method changes until 1980, and therefore these numbers are included in the chart beginning with the 1981–1985 period.

83. This row concerns method of election changes (e.g., from at large to districts or vice-versa, and the adoption of majority-vote requirements, numbered posts, residency districts, and staggered terms).

84. As indicated in the chart, the total for the number of submitted election method changes does not include the number submitted from 1965 through 1980. Based on this author's review of available Section 5 data, a reasonable guesstimate for the actual grand total for submitted election method changes is about 17,000.

85. The objection statistics for the 1986–1990 period include an objection in 1986 to 525 annexations by a single city, included in one submission.

Annex's	0	95	148	219	663	125	9	2	1,261
Redist'ings	1	65	37	121	55	190	10	30	509
MOE	5	175	154	69	169	175	11	13	771

As indicated in the table, covered jurisdictions made very few submissions during the first five years after Section 5 was enacted (i.e., the entire time period that the statute initially was to remain in effect). After the Supreme Court's decision in *Allen v. State Board of Elections*,⁸⁶ holding that Section 5 broadly applies to all changes affecting voting, and the publication of the Attorney General's Procedures for the Administration of Section 5 in 1971,⁸⁷ the number of submitted changes increased substantially. The number leaped upward again when Texas became covered pursuant to the 1975 Voting Rights Act amendments.⁸⁸ The increases continued into and through the 1980s, and through the first half of the 1990s. In the second half of the 1990s and in this decade, the number of submitted changes has declined to some extent.

Initially, from 1965 to 1970, the Justice Department issued few objections, since few submissions were being made. With the increase in the number of submissions beginning in 1971, the number of submissions and changes to which objections were interposed also increased substantially, and the number of submission objections then remained fairly constant until 1985. Throughout this period, there were a large number of annexation objections. Redistricting objections were particularly prevalent from

86. 393 U.S. 544, 563–71 (1969).

87. Procedures for the Administration of Section 5 of the Voting Rights Act, 36 Fed. Reg. 18,186 (Sept. 10, 1971) (codified at 28 C.F.R. pt. 51).

88. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. pt. 51 app. (2005).

1981 to 1985, when a much larger number of redistricting plans were submitted than in previous years. Election method objections were especially prevalent in the 1970s, when the Department interposed a large number of objections to the adoption of at-large election systems and to provisions that enhanced the discriminatory effect of at-large election systems (majority-vote requirements and provisions that eliminated or limited the opportunity to single-shot vote). These objections continued into the 1980s, but at a lower rate.⁸⁹

During the latter half of the 1980s (through 1990), the overall number of submission objections declined (though the number of objected-to changes increased), as the post-1980 redistricting cycle ran its course. However, the Department continued to object to numerous annexations. In addition, the number of election method objections notably increased, reflecting the Department's continuing objections to practices that enhanced the discriminatory effect of at-large elections and the Department's new objections to changes from at-large to mixed (district and at-large) election systems.⁹⁰

Following the 1990 Census, redistrictings flooded into the Department for review and, as was the case after the 1980 Census, the Department interposed objections to a significant number of plans. With the increase in the number of redistricting objections and a continuing high number of election method objections, the overall number of submission objections reached a record high from 1991 through 1995.

Beginning in about 1996, however, the number of submission objections took an abrupt nose dive, and has remained at a very low level since then. The steep reduction has occurred across the

89. Complete Listing of Section 5 Objections, *supra* note 15.

90. *Id.*

board—there have been only a handful of annexation objections, relatively few election method objections, and, unlike what occurred after the 1980 and 1990 Censuses, there was only a small uptick in the number of redistricting objections after the 2000 Census.

Table 2 summarizes the extent to which various legal bases have been used by the Justice Department to support its objections.⁹¹ The objection-basis categories are: “retrogression” (objections based solely on retrogression or on a combination of retrogression and other bases); “purpose” (objections to non-retrogressive changes based solely on purpose or on purpose and another basis other than retrogression); “dilutive effect, Section 2, and minority language” (objections based solely on the constitutional vote dilution law that preceded the incorporation of that law into the Section 2 results test in 1982, the Section 2 results test, or the provisions of the Voting Rights Act that require the translation of election materials into languages other than English); and “other.”

91. The Justice Department does not maintain any summary data regarding the legal bases it has relied upon in its objections. The pre-2000 data included in Table 2 are from McCrary, Seaman, & Valelly, *supra* note 14, at 82, who constructed their data set by reviewing all of the Department’s pre-2000 objection letters. *Id.* at 28–35 (describing the research design). The post-2000 data were developed by this author, using the same approach as McCrary, Seaman, & Valelly.

Table 2: Objection Bases by Time Period

Objection Basis	1965–79	1980s	1990s	2000s
Retrogression ⁹²	83%	66%	40%	98%
Purpose	3%	27%	55%	2%
Dilutive Effect, Section 2, & Minority Language	10%	2%	3%	0%
Other	4%	6%	1%	0%

As can be seen from Table 2, during the first fifteen years of Section 5 enforcement, objections typically were interposed because the submitted voting changes were retrogressive (over four-fifths of the objections were based on retrogression). In the 1980s, retrogression became less important (accounting for about two-thirds of the objections) and the Department increasingly interposed objections to non-retrogressive changes based on discriminatory purpose (discriminatory purpose accounted for a mere three percent of the objections prior to 1980 but was the basis for about a fourth of the 1980s objections). This trend continued with full force into the 1990s, with purpose objections overtaking retrogression objections as the most common type of objection (purpose objections constituted just over half the 1990s objections). However, in January 2000, the Supreme Court released its decision in *Bossier Parish II*, effectively eliminating the purpose test from Section 5.⁹³ Few objections have been interposed since then, and all except one have been based on

92. A small percentage (about nine percent) of the retrogression objections interposed in the 1980s were based on the analysis developed by the District Court for the District of Columbia in *Wilkes County v. United States*. 450 F. Supp. 1171, 1174–76 (D.D.C.), *aff'd mem.*, 439 U.S. 999, 999 (1978). As discussed *infra* at Part IV.A.4, although the *Wilkes County* test purportedly was a retrogression test, it did not measure whether minority voters in fact would be worse off than before if the enacted voting change was implemented, and thus it actually did not provide a basis for interposing retrogression objections.

93. See discussion *supra* at Part I.A. and note 58.

retrogression.⁹⁴ The Supreme Court's 1997 decision in *Bossier Parish I*—precluding objections based on Section 2 or other provisions of the Voting Rights Act—had less impact since, as indicated in Table 2, only a small percentage of objections prior to that decision were based solely on the Section 2 results test or on the Act's minority language requirements.

C. Objections to Redistrictings, Election Method Changes, and Annexations

1. Redistricting objections

More detailed information regarding the Justice Department's redistricting objections is set forth in Table 3.⁹⁵

94. The one purpose objection interposed after the *Bossier Parish II* decision (to a non-retrogressive change) apparently was not based on the "intent to retrogress" standard but, instead, appears to have been based on the pre-*Bossier* definition of discriminatory purpose. Letter from R. Alexander Acosta, Assistant Attorney Gen., U.S. Dep't of Justice, Civil Rights Div., to the Honorable H. Bruce Buckheister, Mayor (Sept. 16, 2003), http://www.usdoj.gov/crt/voting/sec_5/ltr/l_091603.html. Thus, as discussed above, the Justice Department has yet to identify an instance in which, after *Bossier Parish II*, a covered jurisdiction acted as an "incompetent retrogressor" in enacting or seeking to administer a voting change.

95. The data in Table 3 concern both redistrictings and the adoption of first-time districting plans in connection with a change from an at-large to a district method of election. The data on the number of submitted plans, objected-to plans, and states with objected-to statewide plans in the 1970s, 1980s, and 1990s are from this author's previous essay analyzing the Justice Department's preclearance reviews of redistricting plans. Posner, *supra* note 15, at 88–89. The parallel data for this decade were obtained from the Justice Department's preclearance data reports. The data on the bases for the objections in the 1980s, 1990s, and 2000s were developed by this author using the same approach followed by McCrary, Seaman & Valelly, *supra* note 14, at 28–35 (describing research design). As is the case in Table 2, the "retrogression" category includes objections based in whole or in part on retrogression, and the "purpose" category includes objections to non-retrogressive changes based in whole or in part on discriminatory purpose.

Table 3: Redistricting Objections Following the Decennial Censuses

Subject	1970s (1971–74)	1980s (April 1981 to June 30, 1985)	1990s (April 1991 to June 30, 1995)	2000s (2001 to June 30, 2005)
Submitted	c. 400	c. 1500	c. 2800	c. 2800
Objections (% of submitted)	58 (15%)	c. 113 (8%)	c. 185 (7%)	31 (1%)
Retrogression Objections ⁹⁶ (% of objections)	Not tallied	56 (50%)	31 (17%)	30 (100%)
Purpose Objections (% of objections)	Not tallied	38 (34%)	153 (83%)	0
States in Which AG Interposed an Objection to One or More Statewide Plans	6	10	13	3

96. About 13 of the retrogression objections interposed in the 1980s were based exclusively on *Wilkes County*, 450 F. Supp. at 1174–76.

As can be seen, the number of redistricting submissions increased dramatically in the 1980s and 1990s, and then leveled off after 2000.⁹⁷ The number of objections likewise rose substantially in the 1980s and 1990s, and these objections were increasingly based on discriminatory purpose and not retrogression. Following the Supreme Court's decision in *Bossier Parish II*, the number of redistricting objections decreased dramatically.

2. Election method objections

The Justice Department's election method objections may be categorized into four groups by the type of election method change and the usual basis for the objection.⁹⁸

The first two groups have consisted of changes from district to at-large elections, and changes within the context of a pre-existing at-large system that enhanced the at-large system's discriminatory impact (i.e., majority-vote requirements and provisions such as numbered posts, residency districts, and staggered terms that preclude or limit the ability to engage in single-shot voting). These objections typically have been based in whole or in part on retrogression, and have been a staple of Section 5 enforcement since Section 5's enactment.⁹⁹

97. The 1980s increase was due in large part to increased compliance by local jurisdictions with the one-person, one-vote requirement and the addition of Texas as a covered state in 1975. Posner, *supra* note 15, at 81. The 1990s increase was due in large part to jurisdictions changing from at large to district systems following Congress's adoption of the Section 2 results test in 1982. *Id.*; NATIONAL COMMISSION ON THE VOTING RIGHTS ACT, PROTECTING MINORITY VOTERS 81–88 (2006); QUIET REVOLUTION IN THE SOUTH, *supra* note 6, at 385.

98. The information regarding the bases for the election method objections and the issues that these objections addressed comes from this author's extensive knowledge of these objections from his years of work supervising Section 5 reviews within the Justice Department.

99. Since 1965, the Justice Department has interposed approximately ninety objections to at-large election systems, 100 objections to the adoption of a majority-vote requirement in the context of a pre-existing at-large system, and 130 objections to the adoption of anti-single-shot provisions in the context of a pre-existing at-large system. Complete Listing of Section 5 Objections, *supra* note 15.

The third group has involved changes from at-large voting to mixed systems of district and at-large seats. These changes were not retrogressive and the objections generally were based on discriminatory purpose. The objections were triggered by a jurisdiction retaining a relatively large proportion of at-large seats in the new election system or limiting minority electoral opportunity with regard to the at-large seats (by adopting a majority vote requirement, numbered posts, and/or staggered terms). These objections became prominent in the early to mid-1980s when, as previously noted, many local jurisdictions abandoned their at-large systems in response to the 1982 enactment of the Section 2 results test.¹⁰⁰ These objections disappeared in the mid-1990s, first because fewer jurisdictions changed from at-large voting (probably in large part because so many had made the change in the prior ten years or so), and then because the Supreme Court (in its *Bossier Parish II* decision) eliminated non-retrogressive, discriminatory purpose as a basis for interposing Section 5 objections.¹⁰¹

The last group has involved changes in the number of elected officials or the creation of new elected bodies where the objection was prompted by a determination that the method of election to be utilized for the new elected officials was discriminatory. These objections also generally were not based on retrogression. A large percentage were to the establishment of new elected state court judgeships;¹⁰² the objections to additional judgeships began in 1988

100. Since 1982, the Justice Department has interposed objections to about fifty submissions where the change was from at-large voting to a mixed system. *Id.*

101. Data on the number of jurisdictions submitting specific types of election methods for preclearance are available in the Justice Department's database only for years beginning in 1991. From 1991 through 1995, jurisdictions submitted an average of forty-four mixed election systems for preclearance each year. Since 1995, the per-year average has been about twelve.

102. Complete Listing of Section 5 Objections, *supra* note 15.

and ended in the mid-1990s after four states responded to these objections by seeking preclearance from the District Court for the District of Columbia and obtaining judgments in their favor.¹⁰³

3. *Annexation objections*

Typically, annexation objections have been interposed based on the Supreme Court's 1975 decision in *City of Richmond v. United States*, which held that annexations that significantly reduce a city's minority population percentage in the context of racially polarized voting may be precleared only if the city's election system fairly reflects minority voting strength in the post-annexation city.¹⁰⁴ Annexation objections also have been based on racial selectivity, i.e., a determination that the new lines were selected based on the race of the persons to be included or not included in the annexed area.¹⁰⁵

D. Preclearance Decisions by the District of Columbia Court

Covered jurisdictions rarely seek preclearance by filing suit in the District Court for the District of Columbia. Whereas jurisdictions have sought preclearance from the Justice Department for over 439,000 voting changes since 1965, they have filed only sixty-eight preclearance lawsuits, involving perhaps several hundred changes.¹⁰⁶

103. *Texas v. United States*, No. 94-1529, 1995 WL 769160, at *1 (D.D.C. July 10, 1995); *Texas v. United States*, No. 94-1529, 1995 WL 456338, at *1 (D.D.C. Apr. 24, 1995); *Georgia v. Reno*, 881 F. Supp. 7, 8 (D.D.C. 1995); *New York v. United States*, 874 F. Supp. 394, 395 (D.D.C. 1994), *reconsideration denied*, 880 F. Supp. 37, 38 (D.D.C. 1995). *See also Arizona v. Reno*, 887 F. Supp. 318, 321, 324 (D.D.C. 1995) (holding that preclearance may not be denied based on a Section 2 violation; the case was continued as to the purpose issue, and the Justice Department subsequently agreed that no discriminatory purpose was present and that preclearance was required).

104. 422 U.S. 358, 378 (1975). The information regarding the frequency with which annexation objections have been based on the *City of Richmond* rationale comes from this author's extensive experience in enforcing Section 5 within the Justice Department.

105. *Perkins v. Matthews*, 400 U.S. 379, 388 (1971).

106. Department of Justice, Section 5 Declaratory Judgment Actions (Aug. 2004 table) (on file with author).

Only nineteen have produced preclearance decisions in contested cases (eight in favor of preclearance, eleven not), and several resulted in court rulings without an ultimate preclearance determination; the others led to judicial preclearance with no Justice Department opposition or were dismissed.¹⁰⁷

The paucity of preclearance court filings and decisions not only means that the Justice Department makes almost all the preclearance decisions, it also means that the Department carries out its responsibility with little year-to-year supervision by the courts. For example, since 1982 (the year that Section 5 last was extended), there have been a total of only four court decisions regarding the application of Section 5 to redistrictings (by the district court in 1982 in *Busbee v. Smith*,¹⁰⁸ and by the Supreme Court in 1997, 2000, and 2003 in the *Bossier Parish School Board* cases and in *Georgia v. Ashcroft*),¹⁰⁹ despite the fact that the review of redistricting plans is one of the most important and controversial applications of the preclearance requirement.

IV

PRIOR VIEWS REGARDING THE JUSTICE DEPARTMENT'S MODUS OPERANDI IN ENFORCING SECTION 5

A. Justice Department as Illegitimate Advocate for Minority Voters

1. *View from the Supreme Court*

The best-known and authoritative critique of the Justice Department's modus operandi in enforcing Section 5 has come from

107. *Id.*

108. 549 F. Supp. 494, 526 (D.D.C. 1982), *aff'd mem.*, 459 U.S. 1166, 1166 (1983).

109. 539 U.S. 461 (2003).

the Supreme Court, in its 1995 decision in *Miller v. Johnson*,¹¹⁰ the Court's first application of the race-conscious redistricting limitation announced in *Shaw v. Reno*.¹¹¹ *Miller* involved a challenge to the congressional redistricting plan adopted by the State of Georgia following the 1990 Census. Georgia defended the plan by arguing that it had been adopted to remedy the Justice Department's objections to the State's two earlier attempts to redraw the State's congressional district lines after the 1990 Census; these objections, the State argued, provided it with the compelling state interest needed if the challenged plan was to be subjected to a strict scrutiny review. The Court disagreed, holding that Justice Department objections, on their face, may not supply the requisite compelling state interest, and that the specific objections interposed to the Georgia plans were flawed and thus did not provide the requisite compelling state interest in that case.¹¹²

According to *Miller*, the Georgia objections were of no avail because they were based on a purported Justice Department policy of refusing to grant preclearance to submitted redistricting plans unless the plans included the maximum number of majority-minority districts that could be drawn.¹¹³ To reach this conclusion, the Supreme Court began by affirming the district court's ruling that the congressional redistricting plans to which the Department had objected did not, in fact, violate the Section 5 nondiscrimination test. The Justice Department had based its objections on discriminatory purpose (the plans were not retrogressive) but the Court concluded

110. 515 U.S. 900, 920–27 (1995).

111. 509 U.S. 630, 647–49 (1993).

112. *Miller*, 515 U.S. at 922–25. The Court assumed, but did not decide, that the existence of a valid Section 5 objection may qualify as a compelling state interest. *Id.* at 921.

113. *Id.* at 924–25.

that the purpose claim was “insupportable.”¹¹⁴ This finding, by itself, meant that the Department’s objections to the earlier Georgia plans were invalid, and thus it was sufficient to defeat the State’s argument that remedying the objections provided the State with the requisite compelling state interest. Nonetheless, the Court went on, affirming the district court’s further ruling that the objections were based on a Justice Department maximization policy.¹¹⁵ According to the Court, this policy not only misapplied the Section 5 nondiscrimination test but, more fundamentally, raised “serious constitutional concerns”¹¹⁶ because of its “implicit command that States engage in presumptively unconstitutional race-based districting.”¹¹⁷ In other words, according to the Court, the Justice Department was not merely mistaken when it interposed the objections, it had acted in an illegitimate manner.

The evidentiary support for the Court’s “Justice Department as illegitimate maximizer” conclusion was extraordinarily weak, however. At the outset, the Court made no claim that the Justice Department had set forth its purported policy in any written document (in Section 5 objection letters or otherwise). No documentation was produced in support of the existence of any such policy and, as the Court acknowledged, the Solicitor General had advised the Court that no such policy existed.¹¹⁸

114. *Id.* at 924.

115. *Id.* at 925–26.

116. *Id.* at 926.

117. *Id.* at 927.

118. *Id.* at 924–25. Similarly, in speeches that dealt with the Justice Department’s approach to reviewing post-1990 redistrictings, Department officials stated that the Department was not enforcing any policy of maximization or proportionality. See e.g., John R. Dunne, *Remarks*, 14 CARDOZO L. REV. 1127, 1128 (1993) (“There is one thing the Civil Rights Division does not do: It does not require, because the law does not require, the maximization of minority representation. . . . Nor are jurisdictions required to guarantee or to attempt to guarantee racial or ethnic proportional results.”).

Lacking direct evidence, the Court nonetheless concluded that it could infer the existence of a maximization policy. This was problematic on its face, since the Court had before it information about just two of the Department's post-1990 redistricting objections, a poor foundation on which to infer a general policy. Moreover, even with regard to the two Georgia objections, the Court's evidence consisted of a small assortment of less-than probative or unpersuasive facts.

The most damning admission, according to the Court, was a statement by a Justice Department line attorney noting that, during the Section 5 reviews of the objected-to plans, one method he used to analyze the plans was to overlay the adopted district lines on a map showing the location of black population concentrations to “see how well those lines adequately reflected black voting strength.”¹¹⁹ Yet, this action, on its face, was clearly appropriate since it provided relevant information about the impact of the plan on black voters, an assessment that is an essential part of any inquiry into discriminatory purpose.¹²⁰ Whether, as the Supreme Court contended, this action had a more sinister motive could not be gleaned from the line attorney's statement but only could be demonstrated by some other extraneous evidence. But the other inferential evidence pointed to by the Court, in a string citation to the district court's findings, is equally unpersuasive.¹²¹

119. *Miller*, 515 U.S. at 925.

120. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977).

121. *Miller*, 515 U.S. at 925 n.*. The only other direct statement by a Justice Department employee cited by the Court was a statement by the Assistant Attorney General regarding the Department's approach to applying the Section 2 results test in Section 5 reviews. But that test was not at issue in the Georgia objections, as the Court recognized.

The Court cited to one secondhand report of a Justice Department statement regarding the Department's approach to enforcing Section 5, offered by a black Georgia state legislator. The legislator testified that the Justice Department had told covered jurisdictions that Section 5

Having found this policy with respect to the Justice Department's review of Georgia's congressional redistricting plans, the Supreme Court has not addressed the purported scope of the policy's application. Clearly, however, the Court does not view it as having been limited to the Georgia reviews¹²² and, if the policy existed, there does not seem to be any reason why it would have been limited to any particular subset of the Department's reviews of post-1990 redistricting plans (at least those reviews conducted prior to the Court's rulings in *Shaw* and *Miller*).

If the Justice Department actually imposed a constitutionally-suspect maximization policy in reviewing the post-1990 redistrictings

required them to draw as many black-majority districts as possible in adopting post-1990 plans. But this was a weak and solitary evidentiary reed, given that the legislator was a leading proponent of efforts to maximize the number of black-majority congressional districts in Georgia and thus was a self-interested reporter of what the Justice Department allegedly had said. In addition, his was the only secondhand statement provided by the district court to the effect that Department officials had spoken of a maximization policy.

The Supreme Court also noted two district court findings that merely built on the district court's maximization conclusion but did nothing to demonstrate that the underlying finding itself was valid. The district court found that, during the Section 5 reviews of the Georgia plans, the Justice Department did not retreat from applying its purported maximization policy, and that the Department's adoption of such a policy suggested that the Department did not understand the importance of other districting considerations.

Lastly, the Court noted the district court's citation to similar findings by other district courts. *Id.* (citing *Johnson v. Miller*, 864 F. Supp. 1354, 1383 n.35 (S.D. Ga. 1994)). However, the record in this regard is also slim and unpersuasive. The district court cited to three cases: *Shaw v. Hunt*, 861 F. Supp. 408 (E.D.N.C. 1994), *rev'd*, 517 U.S. 899 (1996) (where the dissenting district court judge argued the maximization point), 861 F. Supp. at 486–88; *Hays v. Louisiana*, 839 F. Supp. 1188, 1196–1197 n.21 (W.D. La. 1993), *vacated & remanded*, 512 U.S. 1230 (1994) (demonstrating that the court's maximization concern flowed entirely from its strong disagreement with the Justice Department's application of the Voting Rights Act's legal standards, and not from any affirmative evidence of a maximization policy); and, *Turner v. Arkansas*, 784 F. Supp. 553, 561 (E.D. Ark. 1991), *aff'd mem.*, 504 U.S. 952 (1992) (demonstrating that the court simply quoted with approval the opinion of conservative theorist Abigail Thernstrom that the Justice Department was wrongfully promoting race-conscious redistricting).

122. In *Shaw v. Hunt*, a post-*Miller* race-conscious redistricting case, the Supreme Court applied its maximization finding in *Miller* to hold that the Justice Department had used the same policy in interposing an objection to North Carolina's post-1990 congressional redistricting plan. 517 U.S. 899, 911–12 (1996). The Court's holding was based entirely on the *Miller* finding and did not cite any further evidence that a maximization policy existed. *Id.*

enacted by Section 5 jurisdictions, one might think that, after the holdings in *Shaw* and *Miller*, these plans would have been struck down en masse. This policy potentially would have infected, and thus rendered suspect, a very large number of post-1990 plans—most of the remedial plans adopted after the Department interposed objections, as well as many that the Department initially precleared, since jurisdictions allegedly were advised by the Department of the maximization policy¹²³ and presumably would have had an interest in implementing the maximization approach on their own in order to avoid an objection.¹²⁴ The policy also could have infected plans adopted after the 2000 Census as well, since jurisdictions whose post-1990 plan had not been invalidated as a racial gerrymander could have been deterred from undoing maximization that occurred in the post-1990 plan because of concerns regarding the Section 5 retrogression standard.

That said, the record indicates that only a handful of redistricting plans adopted by Section 5 jurisdictions have been invalidated as unconstitutional racial gerrymanders.¹²⁵ While there may be a

123. *Miller*, 515 U.S. at 925 n.*.

124. From April 1991 until June 1995, when *Miller* was decided, the Department interposed objections to plans for almost 150 elected bodies and reviewed over 2,800 redistricting plans. Posner, *supra* note 15, at 88–92; *See supra* Table 3.

125. Congressional plans have been struck down in six states wholly or partially covered by Section 5 (in the partially covered states, the invalidated district included covered counties): Georgia (*Johnson v. Miller*, 864 F. Supp. 1354 (S.D. Ga. 1994), *aff'd & remanded*, 515 U.S. 900 (1995), *on remand*, 922 F. Supp. 1556 (S.D. Ga. 1995), *aff'd on other grounds*, 521 U.S. 74 (1997)); Louisiana (*Hays v. Louisiana*, 839 F. Supp. 1188 (W.D. La. 1993), *vacated & remanded*, 512 U.S. 1230 (1994), *on remand*, 862 F. Supp. 119 (W.D. La. 1994), *vacated & remanded*, 515 U.S. 737 (1995), *on remand*, 936 F. Supp. 360 (W.D. La. 1996), *appeal dismissed as moot*, 518 U.S. 1014 (1996)); New York (*Diaz v. Silver*, 978 F. Supp. 96 (E.D.N.Y. 1997), *aff'd mem.*, 522 U.S. 801 (1997)); North Carolina (517 U.S. 899 (1996)); Texas (*Bush v. Vera*, 517 U.S. 952 (1996)); and Virginia (*Moon v. Meadows*, 952 F. Supp. 1141 (E.D. Va. 1997)). State legislative plans have been struck down in three states wholly covered by Section 5: Alabama (*Kelley v. Bennett*, 96 F. Supp. 2d 1301 (M.D. Ala. 2000), *vacated & remanded on other grounds sub nom. Sinkfield v. Kelley*, 531 U.S. 28 (2000)); Georgia (*Johnson v. Miller*, 929 F. Supp. 1529 (S.D. Ga. 1996)); and South Carolina (*Smith v. Beasley*, 946 F. Supp. 1174 (D.S.C. 1996)). Local plans have been invalidated

variety of reasons for this (both legal and practical), it adds further doubt to the proposition that the Justice Department implemented any maximization policy at all.

2. *Conservative commentators*

A number of conservative commentators, both before and after the Supreme Court's decision in *Miller*, have voiced similar criticisms about the Justice Department's exercise of its preclearance authority.

One of the leading critics is Abigail Thernstrom, a member of the U.S. Commission on Civil Rights and a Senior Fellow at the Manhattan Institute. In her 1987 book *Whose Votes Count?*, Thernstrom presents a wide-ranging attack on the manner in which Congress, the Supreme Court, the District Court for the District of Columbia, and the Justice Department all have interpreted (or, from her perspective, twisted) Section 5. She contends that Congress' original intent, in 1965, was only to ensure that black citizens are shielded from discrimination when seeking to register to vote and cast their ballots on election day, and that Section 5 subsequently has been wrongfully "reshaped into an instrument for affirmative action in the electoral sphere."¹²⁶ She believes that the right to vote should be viewed solely or primarily as a right of individuals to participate, and not as a right of groups to obtain fair or effective representation, and that Section 5 has ventured much too far into the sphere of group rights in redistributing political power between white and minority citizens.¹²⁷

for three covered jurisdictions: *Clark v. Putnam County*, 293 F.3d 1261 (11th Cir. 2002); *Wilson v. Mayor & Bd. of Alderman*, 135 F.3d 996 (5th Cir. 1998); *Prince v. Horry County Council*, No. 4:97-0273-12 (D.S.C. Oct. 31, 1997).

126. ABIGAIL THERNSTROM, *WHOSE VOTES COUNT?* 27 (1987).

127. *Id.* at 232-44.

With regard to the Justice Department's enforcement approach, Thernstrom argues that Section 5's dramatic shift from the usual federal model is acceptable only if the Justice Department casts itself as a surrogate court in reviewing submitted changes.¹²⁸ But, she continues, the Department failed to live up to that standard either in the 1970s or during the Reagan Administration in the 1980s (under the otherwise conservative stewardship of William Bradford Reynolds as Assistant Attorney General for Civil Rights). She contends that the Department was biased in its fact-finding.¹²⁹ She also contends that the Department was biased in its interpretation of the Section 5 "purpose and effect" test and in its application of court decisions establishing the contours of that test.¹³⁰ The bottom line, according to Thernstrom, is that the Department sought to circumvent or ignore the retrogression standard established by the Supreme Court in *Beer* in order to maximize the number of minority

128. *Id.* at 168.

129. Her conclusion in this regard is based primarily on two Justice Department objections, a 1974 objection to an annexation by Charleston, South Carolina, and a 1981 objection to a New York City councilman's redistricting plan. Citing the Charleston objection and her review of some internal Justice Department memoranda relating to that objection, she contends that the Department has tended to view the information it obtains about submitted changes through the lens of a "get-the-racist-bastards" attitude. *Id.* Pointing to the New York City review, she contends that the Department has misused and manipulated statistical information regarding registration, turnout, voting patterns, and census population counts. *Id.* at 181–83.

130. She argues that the Department stretched the purpose inquiry far beyond its proper scope by suggesting in objection letters that discriminatory purpose was established when jurisdictions refused to implement an available alternative plan that would result in a higher number of minority officeholders, though the submitted plans were non-retrogressive and thus complied with *Beer*. *Id.* at 174–75. She undercuts this criticism, however, by stating that the D.C. District Court had adopted a similar position. *Id.* at 175–76. If that was the case, then the Justice Department, insofar as it adopted this position, was properly carrying out what Thernstrom argues is its role, a surrogate for the D.C. District Court.

She also maintains that the Department misapplied the effect test by selectively choosing which prior practice to rely upon as the benchmark in judging retrogression, and by misreading two post-*Beer* preclearance rulings by the D.C. District Court. *Id.* at 176–80 (discussing *Mississippi v. United States*, 490 F. Supp. 569 (D.D.C. 1979), *aff'd mem.*, 444 U.S. 1050 (1980), and *Wilkes County v. United States*, 450 F. Supp. 1171 (D.D.C. 1978), *aff'd mem.*, 439 U.S. 999 (1978)).

officeholders and achieve racial and ethnic proportional representation.¹³¹

Thernstrom's analysis is faulty for several reasons. Most importantly, while the Justice Department acts as a surrogate for the District Court for the District of Columbia insofar as it applies the same nondiscrimination standards and burden of proof,¹³² Congress did not intend for the Department to act as a surrogate court in conducting its fact finding. As discussed above, the sixty-day review requirement that Congress included in Section 5 has impelled the Department to conduct its fact-finding in a relatively informal, non-judicial manner, and Congress has twice renewed Section 5 with full knowledge of the Department's preclearance procedures. For this reason, and because the very basis for assigning the administrative preclearance authority to the Attorney General was that he also has the adversarial role of defendant in Section 5 declaratory judgment actions, Congress did not expect that the Department would approach its preclearance decisionmaking with the same institutional neutrality expected of federal court judges. As discussed *infra*, these features of the Section 5 statutory design have played an important role in the Department's adoption of a vigorous enforcement approach. But, as is also discussed *infra*, that approach did not lead the Department to engage in any pattern of improperly twisting the law or the facts to justify objections, as Thernstrom would have it.

131. *Id.* at 178, 189–90. However, she also asserts that the Attorney General's guidepost, the District of Columbia District Court, also followed a maximization approach. *Id.* at 162. See generally MAURICE T. CUNNINGHAM, MAXIMIZATION, WHATEVER THE COST: RACE, REDISTRICTING AND THE DEPARTMENT OF JUSTICE (2001) (arguing that the Justice Department implemented a maximization policy in reviewing redistricting plans in the 1990s).

132. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. § 51.52(a) (2005).

B. Justice Department as Endorser of Discriminatory Changes

The Justice Department's enforcement of the preclearance requirement also has been challenged from the other side of the political spectrum, by civil rights advocates who have argued that the Department wrongfully has precleared changes that clearly were discriminatory. Recently, for example, civil rights groups have decried the Department's August 2005 decision to preclear a new Georgia requirement that voters must present a government-issued photo identification in order to vote in-person on election day.¹³³

The most comprehensive critique by civil rights advocates was issued by the Citizens' Commission on Civil Rights in 1989, discussing the Reagan Administration's enforcement of Section 5.¹³⁴ The report initially concedes that "[e]ven under the Reagan administration, Section 5 served as an effective barrier to the implementation of discriminatory voting law changes"¹³⁵ citing the large number of objections to post-1980 redistricting plans. Without explanation, however, the report then reverses itself and contends that "under the Reagan administration the Justice Department defaulted on effective Section 5 enforcement."¹³⁶ The report attempts to demonstrate this by noting that the objection rate (the number of objected-to changes divided by the number of submitted changes) was lower during the Reagan years (from 1981 through 1987) than

133. David J. Becker, Editorial, *Reviving Jim Crow?*, WASH. POST, Aug. 22, 2005, at A17; Carlos Campos & James Salzer, *Suit Slams Voter ID Law: Groups Brand New Georgia Rule an Illegal 'Poll Tax'*, ATLANTA J.-CONST., Sept. 20, 2005, at A1; Press Release, American Civil Liberties Union, ACLU Condemns U.S. Justice Department Decision to Approve Georgia Photo ID Law (Aug. 26, 2005), available at <http://www.votingrights.org/news/?newsitem=18>.

134. Frank R. Parker, *Voting Rights Enforcement in the Reagan Administration*, in ONE NATION INDIVISIBLE: THE CIVIL RIGHTS CHALLENGE FOR THE 1990S 362 (Reginald C. Govan & William L. Taylor eds., 1989).

135. *Id.* at 374.

136. *Id.* at 377.

the previous decade (1971 to 1980). However, the report's own data undercut this argument since the objection rate also fell during the last three years of the Carter Administration when, according to the Report, the Justice Department was properly enforcing Section 5. The report further points to a number of submissions which, according to the Report, the Department wrongfully precleared, and points to the Reagan Administration's resistance to incorporating the Section 2 "results" standard in the Section 5 analysis.¹³⁷

A different type of liberal critique was offered in the 1982 book *Compromised Compliance*.¹³⁸ The authors contend that, when faced with potentially objectionable changes, the Department regularly negotiated with submitting jurisdictions to get them to adopt compromise changes that the Department then could preclear but which still were discriminatory (albeit less so than the original proposals).¹³⁹ This was done, according to the authors, in order for the Department to minimize its interference in local policy-making processes and to encourage covered jurisdictions to submit their changes for preclearance. The authors, however, cite no evidence that any such enforcement approach in fact was utilized.

137. As noted in the Report, the Reagan Administration at one point opposed incorporating the results standard in Section 5 analyses before ultimately issuing a regulation in January 1987 stating that a "clear" violation of the results test would prompt an objection. *Id.* at 382. The Report contends that after the regulation was issued, the Reagan Administration then did not make vigorous use of the new authority. *Id.* at 364. The Report also notes that on a number of occasions the Assistant Attorney General rejected recommendations by career staff to interpose objections and that the precleared changes then were challenged and found unlawful in suits filed by minority citizens. *Id.* at 370. Perhaps the most notable example was the Department's preclearance of the post-1980 Louisiana congressional redistricting, which then was overturned in *Major v. Treen*, 574 F. Supp. 325 (E.D. La. 1983), cited in Parker, *supra* note 134, at 378.

138. HOWARD BALL, DALE KRANE, & THOMAS P. LAUTH, *COMPROMISED COMPLIANCE* (1982).

139. *Id.* at 86-91.

C. Justice Department as Case-by-Case Problem-Solver

According to several commentators, the Justice Department's approach to deciding preclearance requests historically has been that of a neutral, nonpolitical problem-solver, acting in good faith to enforce congressional strictures against racial discrimination in voting.

This point of view was articulated perhaps most clearly and directly by James Turner, a long-time career attorney and leader in the Civil Rights Division.¹⁴⁰ Writing in 1992, Turner contended that the Justice Department's enforcement of Section 5 has been governed by the principle of "case-specific analysis."¹⁴¹ According to Turner, the Department carefully analyzes the particular, unique facts of each submission and bases its determination entirely on whether these case-specific facts demonstrate that the submitted change discriminates in violation of Section 5. The Department's determinations are not aimed at reaching any particular predetermined result and, accordingly, "a practice that is legal and proper in one jurisdiction may be illegal and improper in another."¹⁴²

According to Turner, because the Department follows this case-specific mode of analysis, the Department has not been swayed in its determinations by any philosophical or political bias. Turner portrays the Department's actions as those of lawyers simply carrying

140. A former colleague of the author, Mr. Turner served in the Civil Rights Division from the 1960s until his retirement from the federal government in the mid-1990s. Beginning in the 1970s and continuing until his retirement, he served as one of several Deputy Assistant Attorneys General in the Division, occupying the sole nonpolitical Deputy Assistant position. He also, on several occasions, served lengthy periods as Acting Assistant Attorney General for Civil Rights (during transitions in Administrations from President Carter to President Reagan, President Reagan to President Bush, and President Bush to President Clinton).

141. James P. Turner, *A Case-Specific Approach to Implementing the Voting Rights Act*, in *CONTROVERSIES IN MINORITY VOTING* 296, 298 (Bernard Grofman & Chandler Davidson eds., 1992).

142. *Id.* at 297.

out, on a case-by-case basis, the policy determinations made by Congress, and contrasts this with the approach followed by social theorists or scientists, who may advocate a particular theory of democratic representation or engage in critiques of democratic trends and models.¹⁴³ In particular, according to Turner, the Department has not sought to use the Voting Rights Act to maximize the number of minority elected officials.¹⁴⁴

Other Civil Rights Division insiders have written in a similar vein as Turner about the Section 5 process. Drew Days, III, who served as Assistant Attorney General for Civil Rights in the Carter Administration and later as Solicitor General in President Clinton's first term, also contributed an essay to the 1992 collection in which Turner's comment appeared.¹⁴⁵ After briefly reviewing others' critiques claiming the Department had done too little to protect minority voting opportunity or had done too much, he concluded that "what emerges from an assessment of the department's enforcement of Section 5 . . . is a picture of generally balanced and judicious use of this 'extraordinary federal remedy.'"¹⁴⁶

A more detailed examination of Section 5 submissions was undertaken by this author, in an essay published in 1998 regarding

143. *Id.* at 298.

144. *Id.* at 299. Turner's essay was a brief commentary on a longer, theoretical discussion of the Voting Rights Act written by a social scientist, and was not intended to be a detailed analysis of the Justice Department's enforcement principles. He based his conclusions entirely on his insider knowledge of the Justice Department decisionmaking process and did not offer any empirical evidence in support of his views, such as citations to specific Section 5 reviews or an analysis across multiple Section 5 submissions. *Id.* at 298-99.

145. Drew S. Days, III, *Section 5 Enforcement and the Department of Justice*, in *CONTROVERSIES IN MINORITY VOTING*, *supra* note 141, at 52-65.

146. *Id.* at 61. Like Turner, Days' conclusion is largely based on his insider-participant knowledge of the workings of the Justice Department. *Accord*, Drew S. Days, III & Lani Guinier, *Enforcement of Section 5 of the Voting Rights Act*, in *MINORITY VOTE DILUTION* 167, 171 (Chandler Davidson, ed., 1984) (in reviewing changes submitted for Section 5 review, the Department's "objective has not been to dictate any particular [electoral] result").

the Justice Department's preclearance reviews of redistricting plans adopted after the 1990 Census.¹⁴⁷ Echoing Turner, the essay argued that the Department's redistricting determinations "rested on a case-specific analysis of the individual facts relevant to the particular [submitting] jurisdiction,"¹⁴⁸ and relied on the Section 5 statutory test of discriminatory purpose and retrogressive effect and not on any policy of maximization or proportional representation.¹⁴⁹

However, in addition to contending that the Justice Department faithfully sought to apply Section 5 law based on the facts of each redistricting submission, the essay also observed that the Department had a well-developed point of view—sympathetic to minority voters—in considering how the Section 5 test was to be applied to the 1990s plans, especially with regard to the issue of discriminatory purpose. As noted above, the great majority of the Department's post-1990 redistricting objections were based on discriminatory purpose and dealt with plans that were not retrogressive. The essay noted that, in applying the Supreme Court's long-established framework for determining whether discriminatory purpose should be inferred,¹⁵⁰ "the Department of Justice took a broad or aggressive view of the purpose test."¹⁵¹ In other words, the essay concluded that the Department was relatively tough on submitting jurisdictions, but not in a way that constituted an unreasonable or illegitimate application of the Section 5 test. It is this perspective which is the subject of the remainder of this Article.

147. Posner, *supra* note 15.

148. *Id.* at 97.

149. *Id.* at 96. To support these conclusions, the essay laid out in great detail the factors considered by the Department in making the purpose and effect determinations, and it cited a large number of submissions as examples. *Id.* at 98–110.

150. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977).

151. Posner, *supra* note 15, at 97.

V

THE REAL STORY BEHIND
THE JUSTICE DEPARTMENT'S ENFORCEMENT OF SECTION 5

A. Vigorous and Principled Reviews

1. *The meaning of vigorous and principled enforcement*

The thesis of this Article is that, historically, the Justice Department has enforced the Section 5 preclearance requirement in a vigorous and principled manner. As demonstrated below, this vigorous and principled enforcement is reflected in the standards the Department has utilized to review submitted changes and the manner in which the Department has applied these standards to the facts of individual submissions.

Overall, the Justice Department has utilized stringent nondiscrimination standards. These standards have been fully in accord with relevant decisions of the Supreme Court and the District Court for the District of Columbia. When a particular standards issue was not directly addressed by the courts or the scope of the court-enunciated standard was ambiguous—and the Department accordingly was required to exercise administrative discretion—the Department selected standards that both would allow for aggressive protection of the right of minority citizens to participate in the political process on a nondiscriminatory basis and were based on reasonable interpretations of the court-enunciated standards and the congressional intent underlying Section 5. The Department did not adopt any policy of maximization or proportional representation and, indeed, the Department did not always adopt the most stringent standards the law might have allowed.

The Justice Department has also, overall, applied the nondiscrimination standards in a tough but fair manner. The

Department has sought to examine rigorously and closely the claims made by submitting jurisdictions to ensure that they were supported by the facts. At the same time, the Department has not engaged in biased factfinding and relies on all the information obtained in each preclearance review to make the preclearance determination.

At bottom, in exercising its administrative discretion in selecting and applying the nondiscrimination standards, the Justice Department has been guided by its knowledge of the history of pervasive discrimination in covered jurisdictions, its understanding of the present-day effects of that discrimination, and its belief in equal electoral opportunity for minority voters.¹⁵²

2. Framework for analyzing the Justice Department's exercise of discretion

As a matter of both logic and common sense, the requirement that preclearance reviews focus on *changes* in voting practices or procedures presented the Justice Department and the courts with three basic (but not mutually exclusive) approaches to making preclearance decisions. These approaches provide a useful framework for analyzing the manner in which the Justice Department has exercised its discretion when making preclearance determinations.

First, the Department and the courts could ask whether a voting change would improve or worsen the electoral opportunity of minority voters.

152. The conclusion that the Justice Department, historically, has engaged in vigorous and principled enforcement of Section 5 is intended to describe a consistent, overall direction of the Department's enforcement efforts and is not meant to define a straight line that links every preclearance decision by the Department. Whether the Department swung toward more or less stringent decisionmaking at particular times is not the issue here, and likewise the correctness of each specific Department decision is not the relevant question. The one important divergence the article does make note of is the apparent use of partisan decisionmaking by the current Bush Justice Department. See *infra* Part IV.A.5.

Second, when a change does not worsen minority opportunity, the Department and the courts could ask whether there are circumstances that de-legitimize the choice that was made where the jurisdiction lawfully could have adopted an alternative course of action that would have been more advantageous for minority voters (compared to the adopted course).

Third, when a change does not worsen minority opportunity, the Department and the courts might ask only whether the jurisdiction lawfully could have adopted an alternative course of action that would have been more advantageous for minority voters, regardless of whether the adopted course was legitimate or not.

The first approach was endorsed early on by the Supreme Court in the *Beer* and *City of Richmond* decisions, setting forth, respectively, the general retrogression standard¹⁵³ and the special retrogression standard to be used in evaluating annexations.¹⁵⁴ These standards, at least prior to the Supreme Court's 2003 decision in *Georgia v. Ashcroft*, were relatively straightforward in concept and therefore typically did not require the Department to exercise any discretion in filling out their meaning, and also were often straightforward to apply. As a result, the Department's retrogression decisions, to a significant degree, have flowed directly from the standards established by the Supreme Court, and thus provide somewhat limited guidance on the question whether the Department has vigorously enforced the preclearance requirement. Nonetheless, the Department's long record of actively using the retrogression standard to interpose objections, and its resolution of the sometimes difficult and controversial questions that have arisen in enforcing this standard, support the vigorous-enforcement conclusion.

153. *Beer v. United States*, 425 U.S. 130, 141 (1976).

154. *City of Richmond v. United States*, 422 U.S. 358, 371 (1975).

The second approach offered the Justice Department a much wider degree of decisionmaking discretion, both with respect to the choice of discrimination standards and with respect to their application, and the manner in which the Department used that discretion provides strong evidence in support of the vigorous-enforcement conclusion. Backed by its analysis of the relevant court decisions and the congressional intent underlying the Voting Rights Act, the Department over time identified a variety of circumstances that would de-legitimize—and thus render unlawful under Section 5—a jurisdiction’s decision to adopt a voting change that was less advantageous to minority voters than an available, lawful alternative. As discussed in the following sections, these included: discriminatory purpose; a “clear violation” of the Section 2 results test; a violation of the constitutional test for vote dilution (prior to the 1982 adoption of the Section 2 results test); a violation of another provision of the Voting Rights Act; or the fact that the existing redistricting plan substantially violated the one-person, one-vote requirement, leading to the conclusion that a fairly drawn, properly apportioned plan should be used as the benchmark (rather than the malapportioned plan) for judging whether the submitted change was retrogressive.

The third approach, of course, represents the policy of maximization or proportional representation. As discussed above and is further discussed below, the Justice Department has not utilized this approach in making its preclearance decisions.

3. *Retrogression decisions*¹⁵⁵

From the beginning, the Justice Department has been active in barring the implementation of retrogressive changes. The period from 1965 to 1979 was one that was ripe for the adoption of such changes¹⁵⁶ and the Department forcefully responded, interposing approximately 320 objections (over eighty percent of all objections during the period) to changes that would have worsened the opportunity of minority voters to effectively participate in the political process.¹⁵⁷

Numerous objections were interposed to retrogressive election method changes (changes from single-member districts to at large voting; and the adoption of majority vote requirements and provisions that precluded or limited the opportunity to single-shot vote in the context of at-large elections), retrogressive redistricting

155. To understand the full picture regarding the Justice Department's preclearance determinations, it is important to note that retrogression objections often have also been accompanied by a determination that the change was motivated by a discriminatory purpose (this is particularly true of the retrogression objections interposed in the 1980s and 1990s). McCrary, Seaman, & Valelly, *supra* note 14, at 82. In that regard, the three-part framework set forth above for analyzing the Department's preclearance decisionmaking may be said to be missing a fourth approach, i.e., when a change worsens minority opportunity, the Department and the courts may ask whether there also are other circumstances that de-legitimize the choice that was made. However, to understand the manner in which the Department has exercised its discretion in enforcing Section 5, the key distinction is between objections based in whole or in part on retrogression (the first analytic approach) and objections to non-retrogressive changes (potentially the second and third approaches).

156. Covered jurisdictions actively were seeking to alter their election structures so as to contain or turn back the tide of minority political power unleashed by the Voting Rights Act and the civil rights movement. U.S. COMM'N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN YEARS AFTER, 1-10 (1975); U.S. COMM'N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: UNFULFILLED GOALS, 1-3 (1981). Furthermore, the scope of the Section 5 effect standard initially was uncertain and then, after the *Beer* decision in 1976, the articulated standard was new and untested.

157. McCrary, Seaman, & Valelly, *supra* note 14, at 82; *see supra* Table 2.

plans, and dilutive annexations, as well as to retrogressive changes in the procedures for administering elections.¹⁵⁸

The Justice Department carried forward the approach it established in the 1970s to precluding the enforcement of retrogressive changes into the next decades. The Department continued to interpose a large number of objections in the 1980s and 1990s based on retrogression.¹⁵⁹ In particular, objections to at-large election systems, devices that would enhance the discriminatory effect of at-large elections, retrogressive redistricting plans, and dilutive annexations remained a staple of the Department's preclearance decisionmaking.¹⁶⁰

The downward trend in the overall number of retrogression objections, which began in the 1980s and has continued into the current decade (Table 2), does not appear to be indicative of any lessening in the Justice Department's resolve to identify and object to retrogressive changes.¹⁶¹ Instead, it appears to reflect the fact that jurisdictions have become more knowledgeable about the retrogression standard, and have been deterred from adopting retrogressive changes by the Department's record of objections.¹⁶² In

158. Motomura, *supra* note 14, at 198 ff. (providing a detailed discussion of numerous objections interposed during this period); Complete Listing of Section 5 Objections, *supra* note 15.

159. McCrary, Seaman, & Valelly, *supra* note 14, at 82; *see supra* Table 2.

160. This identification of the types of change that prompted retrogression objections is based on the author's review of the Justice Department's objection letters.

161. For example, as indicated in Table 3, *supra*, the number of redistricting objections based in whole or in part on retrogression was essentially the same in the current decade as it was in the 1990s.

162. At least prior to *Georgia v. Ashcroft*, 539 U.S. 461 (2003), it often was fairly easy for a knowledgeable attorney or voting consultant advising a covered jurisdiction to identify the types of changes that could prompt a retrogression objection by the Justice Department (such as the adoption of a majority-vote requirement or numbered posts by a jurisdiction that used at-large elections and had a significant minority population; or the adoption of a redistricting plan that changed a majority-minority district into a majority-white district).

addition, because a large number of jurisdictions in the 1980s and early 1990s switched from at-large to district elections as a result of the adoption of the Section 2 results test in 1982,¹⁶³ and because other jurisdictions switched to district elections from the 1970s through the 1990s to remedy Section 5 annexation objections,¹⁶⁴ the number of jurisdictions adopting at-large elections, devices that enhance the discriminatory effect of at-large elections, or dilutive annexations that violate the *City of Richmond* “fairly reflects” test has significantly declined.

As stated above, the extent to which this record of retrogression objections is probative of vigorous Justice Department enforcement is tempered by the fact that the retrogression test often is relatively straightforward to apply. It simply requires a comparison of the new situation to the old, and the question whether an election method change, annexation, or redistricting is retrogressive often is largely determined by reviewing the relevant racial percentages and by analyzing the election results to determine whether and to what extent voting is racially polarized.¹⁶⁵

The retrogression standard, however, can sometimes require difficult and controversial decisions. This has occurred typically where the pre-existing situation does not present a clear benchmark for evaluating the change, the reduction in minority voting strength is numerically small and thus may or may not be significant, or the reduction occasioned by one aspect of the change may be offset by an

163. PROTECTING MINORITY VOTERS, *supra* note 110, at 81–88; QUIET REVOLUTION IN THE SOUTH, *supra* note 6, at 385.

164. Complete Listing of Section 5 Objections, *supra* note 15.

165. Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim Of Its Own Success?*, 104 COLUM. L. REV. 1710, 1719 (2004); Michael J. Pitts, *Georgia v. Ashcroft: It's the End of Section 5 As We Know It (And I Feel Fine)*, 32 PEPP. L. REV. 265, 273–75 (2005); Posner, *supra* note 15 at 98–99.

increase in minority opportunity presented by another aspect of the change.¹⁶⁶ In these situations, the Justice Department typically has sought to apply the law and the facts in a manner so as to fully protect minority electoral opportunity.¹⁶⁷

The potential difficulties involved in applying the retrogression standard, at least in the context of redistrictings, recently have been significantly magnified by the Supreme Court's 2003 decision in *Georgia v. Ashcroft*.¹⁶⁸ However, it remains an open question what

166. Revision of Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 52 Fed. Reg. 486, 498 (Jan. 6, 1987), codified at 28 C.F.R. § 51.55(b), repealed by 63 Fed. Reg. 24109 (May 1, 1998).

167. An example of the Justice Department's stringent application of the retrogression test where the retrogression benchmark was at issue was the Department's March 30, 1982, objection to Mississippi's post-1980 congressional redistricting plan. The new plan severely fragmented the black population concentrations located in the Delta area, but this also was true of the previous 1972 plan, which had been precleared by the Department. The retrogression analysis typically requires the Department to compare the new plan to the plan currently being used, so long as the existing plan is legally enforceable under Section 5. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. § 51.54(b) (2005). Since the 1972 plan was precleared, there was a strong argument that the post-1980 plan was not retrogressive. However, the congressional plan in effect on the State's coverage date (November 1, 1964) did not fragment the black Delta population and, as a result, included a black-majority district. The Department concluded that its preclearance of the 1972 plan was based on a mistaken legal premise, and that the post-1980 plan should therefore be compared to the plan in effect in 1964. As a result, the Department determined that the new plan was retrogressive.

An example of a retrogression objection where the reduction in minority voting strength was relatively small, and thus raised the question whether the reduction had any electoral significance, was the Department's February 11, 1994 objection to the state legislative plans for the State of Alaska. The Department objected to a district where the State had reduced the Alaskan Native voting age population percentage from fifty-six to fifty-one percent, although the Department agreed with the State that the reduction did not necessarily ensure the defeat of a minority-preferred candidate. Posner, *supra* note 15, at 99.

The Justice Department has long recognized that retrogression compelled by compliance with constitutional redistricting requirements does not violate Section 5. Revision of Procedures for the Administration of Section 5, 52 Fed. Reg. at 498. However, the exact manner in which this rule is applied evoked some controversy when the issue was retrogression caused by a need to avoid the creation of an unconstitutionally race-conscious plan. *Abrams v. Johnson*, 521 U.S. 74, 95-97 (1997).

168. 539 U.S. 461 (2003). Depending on the facts of the individual submission, *Ashcroft* may require the Justice Department to determine whether districts in which minority voters do not have the opportunity to elect a candidate of their choice nonetheless qualify as minority "influence" districts; the extent to which the new plan increases the number of such districts; the

the Justice Department's application of the *Ashcroft* decision may say about the Department's approach to enforcing Section 5 since the decision came near the end of the post-2000 redistricting cycle, and thus the Department's experience in reviewing redistrictings in light of *Ashcroft* has been limited.¹⁶⁹

4. *Preclearance decisions regarding non-retrogressive changes*

The Justice Department's record of preclearance decisions with regard to non-retrogressive voting changes clearly demonstrates that the Department has used its discretionary authority to vigorously enforce the preclearance requirement. As the concept of voting discrimination under the Voting Rights Act and the Constitution was defined and re-defined by the courts and Congress in the 1970s and early 1980s, the Department repeatedly was called upon to reconsider the circumstances in which a non-retrogressive change could be considered discriminatory under Section 5. On each occasion, the Department opted for a standard that was both expansive and supported by reasonable legal arguments (though the Department did not necessarily adopt the most expansive interpretation that legal arguments might support). In the middle to late 1980s and in the 1990s, the legal bases on which the Department could invalidate a non-retrogressive change became, at least temporarily, well set, and

extent to which the new plan increases or maintains the opportunity of the minority group's elected representatives to exert legislative leadership, influence, and power; and whether the new set of circumstances and the effectiveness of the minority representatives offset a reduction in the number of electoral opportunity districts. *Id.* at 482–84. All of these questions are difficult and the Court provided little or no guidance on how to answer them. See generally Meghann E. Donahue, Note, "*The Reports of My Death Are Greatly Exaggerated*": Administering Section 5 of the Voting Rights Act After *Georgia v. Ashcroft*, 104 COLUM. L. REV. 1651 (2004).

169. The Justice Department has interposed only a few objections to redistricting plans subsequent to the Supreme Court's decision in *Ashcroft*, and none has addressed the manner in which *Ashcroft* should be applied. See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

the Department then stringently applied the established legal standards in reviewing the facts of individual submissions.

The Justice Department's approach to reviewing non-retrogressive voting changes has unfolded as follows:

Pre-Beer: Before the Supreme Court's 1976 decision in *Beer*, the courts had not addressed the meaning of the Section 5 effect test except in the context of annexations. Of some relevance was the Supreme Court's 1969 decision in *Allen v. State Board of Elections*,¹⁷⁰ where the Court indicated that the concept of vote dilution is an integral part of Section 5. In that regard, the Court linked the right to vote protected by Section 5 to the constitutional understanding of the right to vote set forth in the Court's Fourteenth Amendment equal apportionment decisions.¹⁷¹ But neither the Supreme Court nor the District of Columbia District Court had addressed the extent or manner in which the "vote dilution" concept applied to the Section 5 effect test.

The Justice Department concluded that discriminatory effect under Section 5 meant vote dilution, as indicated by the analyses set forth in its *pre-Beer* objection letters.¹⁷² Objections were interposed based on discriminatory effect both to changes that worsened minority political opportunity (and thus, in retrospect, were invalid under *Beer*) and to changes that either were ameliorative or did not alter that opportunity but violated the constitutional standard for minority vote dilution,¹⁷³ as developed by the Supreme Court in the

170. 393 U.S. 544 (1969).

171. *Id.* at 569 ("The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot." (citing *Reynolds v. Sims*, 377 U.S. 533, 555 (1964))).

172. McCrary, Seaman, & Valelly, *supra* note 14, at 32–33.

173. *Id.*

early 1970s in its decisions in *Whitcomb v. Chavis*¹⁷⁴ and *White v. Regester*.¹⁷⁵

Thus, during the time when the law was relatively ill-formed regarding the meaning of the Section 5 effect test, the Justice Department adopted the broadest available, legally-acceptable concept of a discriminatory effect in voting. A broader test would have been proportional representation, but it was clear that this was disfavored¹⁷⁶ and the Department's letters do not suggest that any such test was adopted. At the same time, few objections were interposed to non-retrogressive changes based on discriminatory purpose.¹⁷⁷

Post-Beer initial responses: After the decision in *Beer*, it appeared that the Justice Department could no longer interpose objections to non-retrogressive changes based on the Section 5 effect standard. However, the Department soon identified new bases for concluding that such changes potentially could be barred by Section 5.

First, the Justice Department concluded that it could continue to apply the constitutional test for vote dilution,¹⁷⁸ based on the Supreme Court's statement in *Beer* that "an ameliorative new legislative apportionment cannot violate Section 5 unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution."¹⁷⁹ The Court did not clearly explain

174. 403 U.S. 124 (1971).

175. 412 U.S. 755 (1973).

176. *Whitcomb*, 403 U.S. at 149.

177. McCrary, Seaman, & Valelly, *supra* note 14, at 82.

178. This determination by the Justice Department is reflected in several objection letters issued after *Beer* was decided. *E.g.*, Letter from Drew S. Days, III, Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to William J. Guste, Jr., Attorney Gen., La. Dep't of Justice (Feb. 7, 1980) (establishment of additional judgeships in City Court of Baton Rouge) (on file with the *Duke Journal of Constitutional Law & Public Policy*).

179. *Beer v. United States*, 425 U.S. 130, 141 (1976).

what this meant, and arguments existed both for and against the proposition that this supported a continuing use of the constitutional vote dilution standard in deciding preclearance submissions.¹⁸⁰ In face of this uncertainty, the Department adopted the interpretation that promoted stringent enforcement of the preclearance requirement. Shortly thereafter, however, in 1980, the Supreme Court issued its decision in *Mobile v. Bolden*¹⁸¹ severely restricting the scope of the constitutional vote dilution claim,¹⁸² and the Justice Department accordingly abandoned use of unconstitutional vote dilution as a basis for interposing Section 5 objections.

A second approach adopted by the Justice Department involved essentially a redefinition of the retrogression test, applying the decision by the District Court for the District of Columbia in *Wilkes County v. United States*.¹⁸³ In that case, the district court determined that, in certain circumstances, retrogression may be found where the submitted change does not in fact worsen the electoral opportunity of minority voters compared to the opportunity that actually existed under the previous voting provision. Specifically, the district court held that where a jurisdiction changes from single-member districts

180. The Justice Department's interpretation appeared to reflect the plain meaning of the Court's statement and, in addition, the Court, in a footnote in *Beer*, appeared to explicitly indicate that it anticipated that the constitutional issue under Section 5 would be decided by utilizing the constitutional law of vote dilution. *Id.* at 142 n.14. On the other hand, in adopting the retrogression test, the Court specifically rejected the district court's use of the constitutional vote dilution test in applying the effect standard, and it would have been odd for the Court to endorse in its second breath what it had rejected in the first. However, the most obvious alternative explanation for the Court's statement also had problems. That explanation was that the Court's reference to constitutional violations simply was another way of referring to the Section 5 purpose standard. But if that was what the Court meant, it could have simply said that, and at the time *Beer* was decided, the Court had not yet held that violations of the Equal Protection Clause require proof of discriminatory purpose. The Court established the intent requirement in *Washington v. Davis*, 426 U.S. 229, 240-41 (1976), decided a little over two months after *Beer*.

181. 446 U.S. 55 (1980).

182. *Id.* at 71-74.

183. 450 F. Supp. 1171 (D.D.C.), *aff'd mem.*, 439 U.S. 999 (1978).

to at-large voting and the pre-existing districts are severely malapportioned, an appropriate benchmark for judging retrogression is a hypothetical, properly apportioned districting plan, fairly drawn to reflect minority voting strength.¹⁸⁴

From 1980 to 1984, the Justice Department applied *Wilkes County* in analyzing and objecting to other jurisdictions' changes from single-member districts to at-large elections, and also relied on the court's holding in some of its redistricting objections. A total of about 20 objections were interposed during this period where the retrogression finding was based exclusively on a *Wilkes County* analysis.¹⁸⁵

As the Justice Department considered whether and how to utilize the *Wilkes County* standard in its administrative preclearance reviews, it was presented with several legal questions about the scope and propriety of the standard. The Department answered these questions, at least initially, by coming down on the side of more stringent enforcement. The core problem was that the putative retrogression analysis endorsed in *Wilkes County* did not, in fact, measure whether minorities were worse off than before, but instead examined whether they were worse off compared to what the pre-

184. *Id.* at 1178. The case concerned the method of electing the county board of commissioners and the county school board, in a county that was 43 percent black in voting age population. After Georgia became covered by Section 5, both bodies changed from electing four members from districts and one at-large to electing all five members at large. Prior to the changes, both bodies used the same districting plan. No district had a black majority in voting age population, and the two districts with the highest black percentages were both 46 percent black in voting age population. Thus, the district court found that abandoning these districts in favor of at-large voting had only a modest retrogressive effect on black voters. *Id.* at 1176. However, the districts were grossly malapportioned (with a top-to-bottom deviation of 128 percent), and the court found that a properly apportioned plan likely would include at least one district that would be about 71 percent black in total population. Using this hypothetical plan as the benchmark, the court found that the change to at-large voting had a significant retrogressive effect on black electoral opportunity. *Id.* at 1175–76.

185. This statistic is based on the author's review of the Justice Department's objection letters.

existing situation might or should have been. Arguably, the Department had no choice but to apply the *Wilkes County* rationale to other jurisdictions which, like the elective bodies in *Wilkes County*, were changing from severely malapportioned districts to at-large voting, since the Department owes substantial deference to the district court's preclearance decisions.¹⁸⁶ However, as noted, the Department also expanded the application of the *Wilkes County* rationale to the analysis of some redistricting plans. This was logical up to a point (if severely malapportioned districts may not be the benchmark for evaluating one type of change, it would seem that they should not be used as the benchmark for evaluating other types of changes). But this use of *Wilkes County* had the potential to read the retrogression requirement completely out of redistricting reviews since almost all redistricting submissions involve existing plans that are malapportioned. The Department continued to use the *Wilkes County* standard after the Supreme Court's 1983 decision in *City of Lockhart v. United States*,¹⁸⁷ which inferentially raised, but did not decide, the question of whether the *Wilkes County* standard was incorrect.¹⁸⁸ After 1984, however, the Department almost completely stopped citing *Wilkes County* in its objection letters.¹⁸⁹

Post-Beer discriminatory purpose: Beginning in the early 1980s, and continuing with increasing force into the 1990s, the Justice Department vigorously applied the purpose test to the review of non-

186. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. § 51.52(a) (2005).

187. 460 U.S. 125 (1983).

188. In *Lockhart*, the Court held that the fact that an existing practice is unlawful under state law does not preclude it from being used as the benchmark for judging retrogression. *Id.* at 132–33.

189. It should be noted that in over half of the *Wilkes County* objections, the Department also based the objection on discriminatory purpose. 450 F. Supp. 1171, 1175–77; see also *supra* note 184 and accompanying text.

retrogressive redistricting plans and election method changes and, as discussed previously, interposed objections to a significant number of these changes.¹⁹⁰ This is the time period in which the Department interposed the great majority of its objections to non-retrogressive changes, and discriminatory purpose was the principal basis for interposing these objections.

The discretion that the Department exercised in utilizing the purpose standard did not relate to its legal construction of the standard itself. The Supreme Court's decision in *City of Richmond* appeared to have conclusively held that the Section 5 purpose standard was co-extensive with the purpose standard under the Fourteenth and Fifteenth Amendments and that a racially motivated, non-retrogressive change was invalid under Section 5.¹⁹¹ Thereafter, the District of Columbia District Court confirmed this reading of *City of Richmond* in its 1982 decision in *Busbee v. Smith*,¹⁹² and the Supreme Court again rejected the argument that the Section 5 purpose test only covered retrogressive purpose in its 1987 decision in *City of Pleasant Grove v. United States*.¹⁹³

Instead, the vigorous nature of the Justice Department's enforcement owed to the manner in which the Department applied the purpose standard to the information presented in each

190. See *supra* Tables 2 and 3; see also *supra* notes 91–95 and accompanying text (discussing the Justice Department's election method objections).

191. *City of Richmond v. United States*, 422 U.S. 358, 378 (1975).

192. 549 F. Supp. 494, 516 (D.D.C. 1982), *aff'd mem.*, 459 U.S. 1166 (1983). On appeal, the State of Georgia specifically presented the question decided in *Bossier Parish II*, whether the Section 5 purpose standard only bars the implementation of voting changes motivated by an intent to cause retrogression. Jur. St., No. 82-845, at 1 (Oct. Term 1982). While the Court's summary affirmance did not decide this issue, it required the District Court for the District of Columbia—and hence, the Justice Department in its administrative reviews—to continue to treat the Section 5 purpose test as being co-extensive with the Fourteenth Amendment definition of discriminatory purpose. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977).

193. 479 U.S. 462, 471 n.11 (1987).

submission. In a variety of situations, the Department required submitting jurisdictions to put forward specific, credible information demonstrating the absence of discriminatory purpose.¹⁹⁴ Further, consistent with the constitutional application of the purpose standard, preclearance was denied if any discriminatory purpose was present, even if nonracial justifications for the change also were shown.¹⁹⁵

Early in the 1980s redistricting cycle, use of the purpose standard to invalidate non-retrogressive changes received a significant boost from the District of Columbia District Court's decision in the *Busbee* case.¹⁹⁶ The litigation concerned the State of Georgia's request for preclearance of its post-1980 congressional redistricting plan, specifically the manner in which the State had drawn its Fifth Congressional District in the Atlanta area. The State argued that the plan was not discriminatory since it had increased the black population percentage in the district from fifty to fifty-seven percent, and the district had elected a black person (Andrew Young) to Congress in 1972 when the district was less than fifty percent black.¹⁹⁷ The district court held that the fact that the new plan was ameliorative did not insulate it from a preclearance denial, and refused to preclear it based on the strong evidence of discriminatory

194. The Justice Department's aggressive use of the purpose standard to interpose objections to non-retrogressive changes is particularly notable given the difficulties that plaintiffs typically encounter in the litigation context in proving that a voting provision was enacted with a discriminatory purpose. VOTING RIGHTS ACT EXTENSION, S. REP. NO. 97-227 at 36-37 (1982), as reprinted in 1982 U.S.C.A.N. 177, 214-15; Karlan, *supra* note 6, at 762-63; Pamela S. Karlan, *Discriminatory Purpose and Mens Rea: The Tortured Argument of Invidious Intent*, 93 YALE L.J. 111, 128-31 (1983).

195. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977). *Accord*, *Texas v. United States*, 866 F. Supp. 20, 27 (D.D.C. 1994); *Busbee*, 549 F. Supp. at 516.

196. *Busbee*, 549 F. Supp. at 516.

197. *Id.* at 511-13.

purpose.¹⁹⁸ Although the case did not break any new legal ground and its explicit evidence of discriminatory purpose was not likely to be repeated in many submissions, the case provided a clear green light to the Justice Department to proceed with interposing objections to other ameliorative but racially motivated changes.

The Justice Department's first concerted use of the purpose standard to object to ameliorative changes involved its objections to redistricting plans by counties and other local units in Mississippi, beginning in 1983, the year after the district court's decision in *Busbee*. Thereafter in the 1980s, the Department objected to approximately 25 plans in Mississippi based solely on discriminatory purpose (and objected to about ten based in part on racial purpose and in part on retrogression).¹⁹⁹

Beginning in the mid-1980s, the Justice Department expanded its use of the purpose standard by interposing numerous objections to changes from at-large to mixed election systems of districts and at-large seats. In the context of racially polarized voting, the adoption of mixed systems was clearly ameliorative, which could have been viewed as providing strong evidence of a nondiscriminatory motive. Nonetheless, from 1982 to 1998 the Department interposed about fifty objections to mixed systems based on discriminatory purpose. These objections often were based on the use of a majority vote requirement and/or an anti-single-shot device for electing the remaining at-large seats.²⁰⁰

198. This included explicitly racist statements by the chair of the state house redistricting committee. *Id.* at 500.

199. This analysis and the cited statistics are based on the author's review of the Justice Department's Section 5 objection letters.

200. Again, the analysis and statistics are based on the author's review of the Justice Department objection letters. See also the discussion of these election method objections *supra* at notes 103–104.

Finally, in the 1990s the Justice Department interposed objections to over 150 redistricting plans based on discriminatory purpose.²⁰¹ As this author argued in his previous study of the Department's post-1990 redistricting reviews, these objections reflected the view that where a plan substantially minimized minority voting strength, and that minimization was not required by adherence to traditional race-neutral districting principles, the jurisdiction bore the burden of demonstrating through specific evidence that discriminatory purpose did not play a role in the selection of the district lines.²⁰²

Objections based on Section 2 or other Voting Rights Act provisions: Congress' 1982 amendment to Section 2 of the Voting Rights Act, reviving the standard for vote dilution used by the courts in Fourteenth Amendment litigation prior to the *Mobile v. Bolden* decision, raised anew the question whether this standard should be incorporated into Section 5 reviews. Reasonable arguments existed on both sides of this issue—for example, some legislative history from the 1982 Voting Rights Act amendments specifically endorsed incorporation²⁰³ while, on the other hand, the 1982 amendments did not include any amendment to Section 5 itself, which could suggest that the preclearance standard had not changed. Ultimately, in 1997, in the *Bossier Parish I* decision, the Supreme Court held (by a vote of 7 to 2) that an objection may not be based on a Section 2 results violation.²⁰⁴

201. See *supra* Table 3.

202. Posner, *supra* note 15, at 101.

203. See generally *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 497 (1997) (Stevens, J., dissenting in part and concurring in part); Revision of Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 52 Fed. Reg. 486, 498 (Jan. 6, 1987), codified at 28 C.F.R. § 51.55(b), repealed by 63 Fed. Reg. 24109 (May 1, 1998).

204. 520 U.S. 471, 480 (1997).

Before the Supreme Court ruled, the Justice Department concluded that a Section 2 results violation would bar Section 5 preclearance. The Department interposed its first such objections in 1983 and its last in February 1997.²⁰⁵ During this period, Department interposed approximately fifty-five objections based in whole or in part on the Section 2 results test, of which approximately eight were based solely on Section 2.²⁰⁶ In 1987, the Department revised the Section 5 Procedures to specify that a “clear” violation of Section 2 precluded Section 5 preclearance.²⁰⁷

Thus, faced with a choice between two overall courses of action—apply the Section 2 results test in Section 5 reviews or not—the Department again exercised its discretion in favor of vigorous Section 5 enforcement. However, by requiring that Section 2 violations be “clear,” the Department did not select the most stringent standard available.

From 1987 through 1994, the Justice Department also interposed a total of fourteen objections based on violations of other provisions of the Voting Rights Act. These included objections based on the requirement that certain jurisdictions provide election materials in one or more languages other than English,²⁰⁸ the requirement that voters may receive assistance at the polls generally from any person

205. The Section 5 objection letters reflect that the first objections, based in whole or in part on Section 2, were in 1983 to redistricting plans in Copiah County, Amite County, and Oktbeha County Mississippi. The last Section 2 objections were in 1997 to a South Carolina state senate redistricting and the adoption of an at-large method of election for Camp Butner Reservation, North Carolina.

206. McCrary, Seaman, & Valelly, *supra* note 14, at 82.

207. Revision of Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 52 Fed. Reg. 486, 498 (Jan. 6, 1987), codified at 28 C.F.R. § 51.55(b), repealed by 63 Fed. Reg. 24109 (May 1, 1998).

208. Voting Rights Act, 42 U.S.C. §§ 1973b(f)(4), 1973aa-1a (2000).

of their choice,²⁰⁹ and the prohibition on the use of any voter registration test or device.²¹⁰ All but two of these objections were based entirely on the statutory violation and not on discriminatory purpose or retrogression.²¹¹

These objections also represented an expansive interpretation by the Justice Department of its preclearance authority. Neither the Voting Rights Act nor the Act's legislative history address the question of whether objections may be based on violations of these provisions.²¹² Moreover, the relevant Department regulation (adopted in 1987) specifies only that these provisions should be considered in making the purpose and retrogression determinations²¹³ and, unlike what the same regulation provided with regard to Section 2 violations, does not and did not specify that a violation of any of these other provisions could, by itself, trigger a Section 5 objection. The objection letters do not explain the rationale underlying the Department's interpretation of its preclearance authority; however, it would seem that the Department believed that public policy considerations counseled against preclearing a voting change that violated another provision of the Act.²¹⁴

209. *Id.* § 1973aa-6.

210. *Id.* §§ 1973b(a)(1), 1973aa.

211. The statistics cited in this paragraph are based on the author's review of the Justice Department's objection letters.

212. For example, while the Senate Report for the 1982 Voting Rights Act amendments explicitly addresses the application of the Section 2 results standard in Section 5 reviews, it does not address the parallel question regarding the application of other Voting Rights Act requirements in these reviews. VOTING RIGHTS ACT EXTENSION, S. REP. NO. 97-227, at 12 n.31 (1982).

213. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. § 51.55(a) (2005).

214. *Cf. Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 485 (1997) (rejecting the United States' argument that public policy considerations support denying preclearance to changes that present a clear violation of the Section 2 results test).

Judgeship objections: Of special note is the Justice Department's use of the purpose and Section 2 standards to interpose objections to the creation of additional elected judgeship positions. From 1988 to 1994, the Department interposed Section 5 objections to the creation of additional judgeships, at the trial and appellate court levels, in the state courts of Alabama, Arizona, Georgia, Louisiana, New York, North Carolina, and Texas.²¹⁵

The Department did not contend that the additional positions themselves were discriminatory, and the establishment of the new positions did not work any change in the underlying method of election. However, the Supreme Court ruled in 1983 that when new elective positions are added to a pre-existing body, the preclearance review of the new positions should include consideration of the pre-existing, underlying election system.²¹⁶ The Department applied this holding to the establishment of additional judgeship positions, all elected at large, and interposed objections based most often on a combination of discriminatory purpose and Section 2 violations, and in a few instances based solely on Section 2.²¹⁷

5. *Decline in the number of objections since the mid-1990s and enforcement by the Bush Justice Department*

The sharp decline in the number of Justice Department objections beginning in the mid-1990s (Table 1) appears to be mostly—if not almost entirely—the result of changed circumstances outside the control of the Justice Department. Thus, the decline does

215. Complete Listing of Section 5 Objections, *supra* note 15.

216. *City of Lockhart v. United States*, 460 U.S. 125, 131–32 (1983).

217. This conclusion is based on the author's review of the judgeship objection letters. These objections ceased after several jurisdictions obtained preclearance of their objected-to judgeships from the District Court for the District of Columbia. See *supra* note 178 and accompanying text.

not, itself, suggest that the Department has altered its approach to exercising its discretionary preclearance authority.

The decline, in part, is the result of the Supreme Court's decisions in recent years significantly narrowing the Justice Department's authority to interpose objections. As discussed above, the Supreme Court's decision in *Bossier Parish II*, along with its earlier decision in *Bossier Parish I*, eliminated the legal bases for interposing objections that underlay a majority of all objections issued in the 1990s, including a substantial majority of the 1990s redistricting objections (Tables 2 and 3). Prior to that, as also has been noted, the Supreme Court indicated in *Miller v. Johnson* that it disapproved of the manner in which the Department was applying the purpose standard to ameliorative voting changes, which also may have had an impact on the Justice Department's preclearance determinations.

At the same time, covered jurisdictions recently have enacted significantly fewer discriminatory changes. As noted previously, by the mid-1990s a substantial number of covered cities, towns, counties, and school boards had abandoned their at-large election systems, which resulted in the near-disappearance of the once-frequent retrogression objections to at-large election systems, majority-vote requirements, anti-single-shot devices, and dilutive annexations. In addition, the number of jurisdictions changing from at-large elections substantially declined in the mid-1990s,²¹⁸ which reduced the likelihood of new objections to mixed election systems even before the *Bossier Parish* decisions eliminated the bases for interposing objections to such changes.

The fact that the Bush Justice Department has brought a more conservative perspective to the enforcement of federal civil rights

218. *See id.*

laws raises the question whether the Department, today, is continuing to vigorously enforce Section 5. Though, for the reasons just articulated, the overall objection numbers do not appear to provide any substantial evidence of a shift in enforcement approach, there have been several notable individual decisions by the Justice Department that suggest that the Department has not enforced the statute in a consistently vigorous manner. As discussed in this author's recent essay regarding the politicization of the Justice Department's decisionmaking in the Bush Administration, the Department in recent years has precleared two highly controversial changes—the State of Georgia's photo identification requirement for voting at the polls on election day and the State of Texas' second post-2000 congressional redistricting plan—where there was substantial evidence that the changes were retrogressive. These changes apparently were precleared as a result of partisan political concerns within the Justice Department, and not based on a good faith application of the law to the facts.²¹⁹

6. *The question of maximization and proportional representation*

As explained above, the Justice Department actively exercised its discretionary preclearance authority to interpose numerous objections to election method changes and redistricting plans that did not worsen minority electoral opportunity. These objections were based in part on the Department's conclusion in each case that the submitting jurisdiction had available to it a reasonable alternative method of election or redistricting plan that would better reflect minority voting strength. If the Department's analyses had stopped there, the Department indeed would have been implementing a

219. Posner, *supra* note 16, at 14–15. That essay also discusses the Justice Department's apparent politicization of its review of a third prominent submission, which dealt with the post-2000 congressional redistricting plan in Mississippi. *Id.* at 13–14.

policy of maximization or proportional representation. But the Department's analyses did not stop there. Instead, the Department interposed objections only when there was an additional set of factual and legal circumstances that de-legitimized the jurisdiction's chosen course of action. Furthermore, the Justice Department identified the types of de-legitimizing circumstances that properly could be relied upon by analyzing the relevant case law, congressional intent underlying the Voting Rights Act, and public policy considerations.

Critics of the Justice Department (including, most particularly, the Supreme Court) have disagreed with the Department's legal analyses with regard to the circumstances, if any, in which Section 5 may bar the implementation of a voting change that does not worsen minority electoral opportunity.²²⁰ But determinations that the Department erred in its legal analyses do not and should not lead to the conclusion that the Department adopted a policy of maximization or proportional representation. That conclusion would require evidence that affirmatively demonstrates that such a policy was adopted. As discussed above, that evidence is lacking.

B. Justice Department Reviews Conducted as Congress Intended

What then is the explanation for the Justice Department's long history of vigorous Section 5 enforcement? Has it simply been the result of which particular individuals have happened to serve as Assistant Attorney General for Civil Rights and as the career staff in the Civil Rights Division? Does it represent just another instance of "mission-creep," operating over a period of several decades? Has it

220. See *supra* notes 9–10 and accompanying text.

resulted from some special protected status that voting rights issues may enjoy in the general equal-protection jurisprudence?²²¹

The answer is that, while all these factors have played a role, the most fundamental reason is that Congress designed Section 5 in a manner that actively promoted vigorous administrative enforcement by the Justice Department. In part, this reflected Congress' conscious determination that the new remedy had to be stringently enforced.²²² And in part, the statute's design may have promoted vigorous enforcement in ways not fully anticipated by Congress, though these were fully in accord with congressional intent. Each of the eight distinct requirements and provisions of Section 5 described in Part I of this Article—unique or uncommon, or broad and all encompassing—have contributed to guiding the Department toward vigorous enforcement, and the administrative framework established by the Department to implement the statute also has played an important role. As was noted recently in a more theoretically oriented discussion of decisionmaking issues, “the design features of both legal and organizational rules have surprisingly powerful influences on people's choices.”²²³ The design rules of Section 5 are no exception.

The first two requirements of Section 5 identified and discussed in Part I of this Article—the reversal of the usual federal relationship between national law and state and local enactments, and the assignment to covered jurisdictions of the risk of nonpersuasion—

221. One longtime commentator on the Voting Rights Act previously posed the question why the Justice Department historically has taken a tough line in Section 5 reviews, and argued that it principally was the result of differences between voting rights issues and the issues that are raised in other areas of Fourteenth Amendment jurisprudence. Grofman, *supra* note 81, at 1243–47.

222. See *South Carolina v. Katzenbach*, 383 U.S. 301, 334–35 (1966).

223. Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not An Oxymoron*, 70 U. CHI. L. REV. 1159, 1161 (2003).

involve, a fundamental alteration in what constitutes the status quo when covered jurisdictions enact voting changes. The status quo under Section 5 is the non-implementation of state and local voting changes, rather than implementation.

This is significant because, when making decisions, people exhibit a clear bias in favor of the status quo.²²⁴ There would appear to be at least two reasons why this is true in legal decisionmaking: Procedurally, factors such as inertia, the existence of decisional checkpoints leading up to the final decision, and resource limitations work against altering the status quo; and, substantively, there is a legitimacy that attaches to the status quo that suggests it should not be changed.²²⁵

Thus, comparing the Justice Department's decisionmaking under the Section 5 regime to the what would have occurred had the Justice Department been required to continue to follow the usual litigation approach, it appears that Congress' redefinition of what constitutes the status quo made it more likely for two reasons that the Justice Department would act to block the implementation of covered jurisdictions' voting changes. The first reason—the shift in the procedural considerations that affect decisionmaking (inertia, decisional checkpoints, and resource limitations) in favor of blocking implementation—is one that long has been recognized Congress anticipated and desired.²²⁶ The second—the enhanced legitimacy that Section 5 attaches to the non-implementation of voting

224. Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193 (1991); William Samuelson and Richard J. Zeckhauser, *Status Quo Bias in Decisionmaking*, 1 J. RISK & UNCERTAINTY 7 (1988).

225. See Sunstein & Thaler, *supra* note 223, at 1180–81 (discussing explanations for the strong effects of the status quo). In legal decisionmaking, the status quo serves as the decisional anchor or starting point. As a general matter, decisional anchors or starting points exert a substantial influence on decision selections. *Id.* at 1177–78.

226. *Katzenbach*, 383 U.S. at 328.

changes—is more subtle and has not been identified as something that Congress anticipated. However, it is fully consistent with the congressional intent to foreclose the implementation of discriminatory voting changes.

The third distinct requirement of Section 5 identified in Part I of this Article—the reallocation of the judicial preclearance authority from local district courts to the District Court for the District of Columbia—also has had a significant influence on the Justice Department’s preclearance decisionmaking. This is because the Justice Department, as a stand-in for the District of Columbia Court, must adhere to that court’s interpretations of the Section 5 nondiscrimination standards, and the reallocation of judicial authority to that court was intended to make it more likely that judicial preclearance decisions would be made by judges who understand and sympathize with the problems faced by minority voters in seeking to exercise effective political power in the covered jurisdictions. Thus, Congress sought to provide the Department with a judicial guide that would more likely point the Department in the direction of vigorous enforcement, which as we have seen, in fact is what has occurred in several important instances.²²⁷

Fourth, the novel power-sharing relationship Congress established between the district court and the Attorney General has pointed the Justice Department toward vigorous Section 5 enforcement in its administrative decisionmaking.

As discussed in Part I, the Attorney General was made the administrative preclearance decisionmaker because Congress wanted to create an administrative mechanism that would permit covered

227. See *supra* Part IV.A.4 (discussing the impact of the district court’s decisions in *Wilkes County v. United States* and *Busbee v. Smith*).

jurisdictions to avoid preclearance litigation, and because providing for submissions to the Attorney General was the most obvious way to create an administrative short-cut since the Attorney General serves as the sole statutory defendant in Section 5 declaratory judgment actions.²²⁸ Thus, the preclearance administrative hat worn by the Attorney General is closely linked to, and is not in any way separated from, the hat he wears in Section 5 litigation as the representative of, and an advocate on behalf of, minority voters. Congress must have fully anticipated that assigning both hats to the Justice Department would influence the Department toward carrying out its administrative decisionmaking authority in a vigorous manner.

Congress also knew in 1965 that, as a matter of actual practice, it was choosing an administrative decisionmaker who likely would be deeply concerned about protecting the voting rights of minority citizens. This was evidenced by the Attorney General's record of bringing voting rights lawsuits in the late 1950s and early 1960s,²²⁹ and the Attorney General's advocacy in 1965 on behalf of the enactment of the Voting Rights Act.²³⁰ This approach was likely to continue in the long term since it was clearly foreseeable that the Attorney General would delegate the administrative preclearance responsibility to the Assistant Attorney General for Civil Rights which, in turn, would mean that the day-to-day work of reviewing and analyzing submitted voting changes would be carried out by the career staff of the Civil Rights Division, composed of individuals who

228. See *supra* Part I.A.

229. See *Katzenbach*, 383 U.S. at 313–14 (discussing the Justice departments' efforts to bring lawsuits).

230. See *United States v. Bd. of Comm'rs of Sheffield*, 435 U.S. 110, 131 (1978).

historically have been committed to opposing discrimination in voting.²³¹

Fifth, by requiring that administrative preclearance reviews be completed within a sixty-day period, Congress indicated that it did not expect that the reviews would be conducted using a judicial model of decisionmaking. Thus, Congress did not expect that the Justice Department would act as a surrogate court in rendering its preclearance decisions, or that the decisions would be made with the full panoply of due process protections. In other words, Congress did not expect that the Justice Department would seek to match its performance to that of an idealized, “neutral” decisionmaker.

Lastly, by broadly requiring that all types of voting changes be subject to preclearance and by establishing an apparently uncompromising and all-encompassing “purpose or effect” nondiscrimination requirement (as well as by reversing the usual vision of what constitutes the status quo when state and local jurisdictions enact voting changes),²³² Congress sought to create a “decisive” remedy against discrimination in voting.²³³ A “decisive” remedy on paper plainly required vigorous enforcement by the Justice Department in order for it to be a decisive remedy in fact.

By pointing the Justice Department toward vigorous enforcement of the preclearance requirement, Congress did not, however, point the Justice Department toward biased or unprincipled enforcement. In other words, Congress did not create a system in which the Justice Department would render decisions based only on what it considers to be in the best interests of minority voters, without due regard for

231. See BRIAN K. LANDSBERG, ENFORCING CIVIL RIGHTS 158–59 (1997) (describing the typical lawyer in the Civil Rights Division).

232. See *supra* Part I.A.

233. *Katzenbach*, 383 U.S. at 335.

the interests of the covered jurisdictions or without fair consideration of the information offered by the jurisdictions in support of preclearance. Congress limited the scope of Justice Department's administrative discretion by specifying that the Department's role is secondary to that of the District Court for the District of Columbia. Accordingly, the Department must justify its decisions within the framework for legal and evidentiary analysis established by the courts. If the Department does not do this, jurisdictions may file suit and obtain relief. Moreover, although Congress has not explicitly addressed the procedures to be used by the Attorney General in reviewing Section 5 submissions, Congress extended Section 5 in both 1975 and 1982 with the understanding that the Justice Department had established a comprehensive set of procedures for conducting Section 5 reviews. These procedures reflect a commitment by the Department to basing its preclearance decisions on case-specific analyses of the particular facts in each submission and to making decisions to interpose objections based on due consideration by several levels of attorneys within the Department (including career supervisors and political appointees). Lastly, the entity within the Justice Department that has the authority for conducting Section 5 reviews, the Civil Rights Division, has had a tradition of rigorous, fact-based lawyering dating back to the 1960s.²³⁴

On the other hand, the statutory and administrative design features that have promoted vigorous enforcement of Section 5 by the Justice Department do not guarantee that such enforcement always will occur. Particular appointees within the Justice Department may, for ideological or partisan reasons, choose to

234. LANDSBERG, *supra* note 231, at 164.

disregard the role Congress has fashioned for the Department. As suggested above, it appears this is what in fact has occurred, to some significant extent, in the current Justice Department.

VI

CONCLUSION

It has been said that “with great power comes great responsibility.”²³⁵ But responsibility to do what? In Section 5 of the Voting Rights Act, Congress sought to establish an administrative preclearance procedure under which the executive officials charged with enforcement would vigorously defend and protect the right to vote of America’s minority citizens against all “subtle, as well as . . . obvious,” discriminatory devices.²³⁶ The fact that the Justice Department has done precisely that is not cause to sound a constitutional alarm, but simply indicates that the Department has acted in good faith in accord with congressional intent. The Justice Department has been a trustworthy agent of Congress, and its performance in exercising the great power vested in it fully supports congressional extension of Section 5 beyond the August 2007 expiration date and a ruling by the Supreme Court that the congressional reauthorization is constitutional.

235. This may be equally true whether the subject is world affairs or the affairs of a comic book hero. Nora Boustany, *A Young Writer Sows Her Own Seeds of Peace*, WASH. POST, Oct. 8, 2005, at A13.

236. *Allen v. State Bd. of Elections*, 393 U.S. 544, 565 (1969).